

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 2

9 Transcript of Motion to Suppress and James
10 Hearing Proceedings before The Honorable James O.
11 Browning, United States District Judge, Las Cruces,
Dona County, New Mexico, commencing on December 8,
2017.

12 For the Government: Ms. Maria Armijo; Mr. Randy
13 Castellano; Mr. Matthew Beck

14 For the Defendants: Ms. Sara Priddy; Ms. Cori
15 Harbour-Valdez; Mr. Patrick Burke; Mr. Robert Cooper;
16 Mr. Jeff Lahann; Mr. Orlando Mondragon; Mr. John
Granberg; Mr. Billy Blackburn; Mr. Scott Davidson;
17 Ms. Amy Jacks; Mr. Richard Jewkes; Ms. Amy Sirignano;
Mr. Christopher Adams; Mr. Marc Lowry; Ms. Theresa
Duncan; Ms. Carey Bhalla; Mr. William Maynard; Mr.
18 Ryan Villa; Mr. Donovan Roberts; Ms. Lisa Torraco;
Ms. Angela Arellanes; Mr. Samuel Winder

19 For the Defendants (Via telephone): Ms. James Castle

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1 THE COURT: Let's get started. It looks
2 like everybody is here. Everyone has got an
3 attorney, ready to go.

4 A couple of announcements. Peter
5 Giovannini will be coming over. But I'm not sure I
6 can get him over here till this afternoon to
7 represent Jason Wright. So I may have to work around
8 him. I think he's waiting for a state court verdict,
9 so we'll work with his schedule. But he'll be here
10 this afternoon.

11 As far as the defense lawyers, I am caught
12 up with CJA vouchers through November 30. In my
13 view, that's not bad. And then there is another
14 packet that I worked on yesterday that got Fed Ex'd
15 back to my office in Albuquerque. So there will be
16 another batch that will hit probably today. And then
17 there was a small batch that I didn't see in my
18 briefcase that I'll take back tonight. That will be
19 in the chair and probably get processed on Monday.
20 So I'm waiting for a Fed Ex to come in today and it
21 may have some more vouchers. But I'm working on
22 them, staying on top of them. So if anybody has any
23 complaints or concerns, let us know, but I think
24 we're doing a pretty good job on that score.

25 All right. How do you we want to shift

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1 here, given that we're probably not going to have
2 Giovaninni over here till noon?

3 MR. VILLA: Your Honor, we have one more
4 witness to call, that may or may not obviate
5 Mr. Wright. But in response to the events of
6 yesterday, we've got another witness to call.

7 THE COURT: All right.

8 MR. VILLA: Would you like us to proceed?

9 THE COURT: Yes, go ahead and call your
10 next witness.

11 MR. VILLA: Mr. Perez calls Gary Ainsworth.

12 THE COURT: Mr. Ainsworth, if you'll come
13 up and stand next to the witness box on my right,
14 your left. Before you're seated, Ms. Standridge, my
15 courtroom deputy, will swear you in.

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1 GARY AINSWORTH,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 EXAMINATION

5 THE CLERK: Please be seated and state your
6 name for the record, spelling your last name.

7 THE WITNESS: My name is Gary Ainsworth.
8 A-I-N-S-W-O-R-T-H.

9 THE COURT: Mr. Ainsworth. Mr. Villa.
10 MR. VILLA: Thank you, Your Honor.

11 BY MR. VILLA:

12 Q. How are you employed?

13 A. Private investigator.

14 Q. Just briefly, can you tell me about your
15 professional background?

16 A. Sure. I've been a private investigator
17 since January 1, 2009. Prior to that, I was a
18 Special Agent with ATF. Retired from ATF in 2008,
19 after about 20 years.

20 Q. And Mr. Ainsworth, did I hire you to
21 conduct investigation on behalf of Mr. Perez?

22 A. Yes, sir.

23 Q. And specifically with respect to Jason
24 Wright, can you tell me, did you conduct an
25 investigation?

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1 A. Yes, sir. I accompanied you to
2 Northeastern New Mexico -- I don't remember if it's
3 detention facility or correctional facility -- in
4 August, this past August, 2017. And we interviewed
5 Mr. Wright.

6 Q. So I want to ask you just a little bit
7 about that interview. Mr. Wright did speak to us?

8 A. Correct.

9 Q. And just focusing on the issue of the
10 wheelchair program and walkers, did you interview
11 Mr. Wright about his memory of the type of walker
12 that Mr. Perez had on March 7, 2014?

13 A. Yes, sir.

14 Q. And just for background, where was Jason
15 Wright, as you understood it from the interview, on
16 March 7, 2014?

17 A. In the same pod where Mr. Molina was
18 murdered.

19 Q. And that's also the pod where Mr. Perez
20 was?

21 A. Correct.

22 Q. And what was Mr. Wright's memory of the
23 type of walker that Mr. Perez had?

24 MR. CASTELLANO: Objection; calls for
25 hearsay.

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1 THE COURT: Well, we're trying to figure
2 out whether evidence should come in. I think I
3 better hear it. Overruled.

4 Q. Can you answer?

5 A. He recalled the walker that Mr. Perez, that
6 Rudy Perez used.

7 Q. Was he able to describe it?

8 A. He said he recalled it, and he described.

9 Because he said it had, like, that middle seat in it.

10 Q. Now, did Mr. Wright discuss whether he
11 worked in the wheelchair program around the time,
12 March 7, 2014?

13 A. He did. And he said that he did work in
14 the wheelchair program during that time.

15 Q. And just briefly, what did he say that they
16 did in the wheelchair program?

17 A. It was basically repairing and rehabbing
18 wheelchairs and walkers.

19 Q. Now, he did say that they repaired and
20 rehabbed walkers?

21 A. Correct.

22 Q. Did he talk about whether the walkers that
23 he worked on and repaired bore any similarity to the
24 type of walker Mr. Perez had?

25 A. Yes, sir, he did.

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1 Q. What did he say?

2 A. He said there was up to 10 of them in the
3 wheelchair program that were similar to Rudy Perez'
4 walker.

5 MR. VILLA: May I have just a moment, Your
6 Honor?

7 THE COURT: You may.

8 MR. VILLA: I'll pass the witness.

9 THE COURT: All right. Thank you, Mr.
10 Villa. Before the Government cross-examines, other
11 defendant have any questions of Mr. Ainsworth?

12 All right. Mr. Castellano, do you have
13 cross-examination of Mr. Ainsworth?

14 MR. CASTELLANO: Yes, Your Honor. May I
15 have a moment?

16 THE COURT: Mr. Castellano.

17 EXAMINATION

18 BY MR. CASTELLANO:

19 Q. Good morning, Mr. Ainsworth.

20 A. Good morning.

21 Q. When you interviewed Mr. Wright, did you
22 prepare any report or have any notes from that
23 interview?

24 A. No, sir, no notes.

25 Q. What do you have that recorded the essence

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1 of the interviews?

2 A. The interview was recorded. And --

3 Q. Are you able to produce that, a copy of the
4 recording for us?

5 MR. VILLA: Your Honor, I mean, he can
6 certainly answer the question. But I believe that
7 recordings of witness interviews are protected under
8 Rule 16 from disclosure. And he certainly has not
9 relied on it to refresh his recollection for his
10 testimony.

11 MR. CASTELLANO: We're able to see what the
12 witness used to refresh his recollection, Your Honor.

13 THE COURT: He said he didn't. You can ask
14 questions, but Mr. Villa said he didn't listen to it.
15 Is that what you said?

16 MR. VILLA: What I meant to say is I didn't
17 ask him to refresh during the course of his
18 testimony, right? I think if he forgot something and
19 he used it to refresh his recollection, the
20 Government would be entitled to it. But I hadn't
21 asked him to do that during the course of the direct.

22 THE COURT: Lay a little more foundation.
23 Let's see -- he may have some questions on that score
24 of Mr. Ainsworth, and we'll see what we're going to
25 do.

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1 Q. Mr. Ainsworth, what did you do to prepare
2 for your testimony today?

3 A. Reviewed the recording.

4 Q. And when was the last time you heard the
5 recording?

6 A. Last night.

7 Q. And so I take it you reviewed the recording
8 to refresh your recollection for testimony today?

9 A. Correct.

10 THE COURT: Well, I think he's entitled to
11 it then.

12 MR. VILLA: Well, Your Honor, I think under
13 612, if it refreshes his recollection during his
14 testimony, they'd be entitled to it.

15 THE COURT: I think if he did it in
16 preparation for the testimony, he's entitled to it as
17 well.

18 MR. VILLA: So we can make arrangements to
19 provide it then.

20 THE COURT: Okay.

21 MR. CASTELLANO: Thank you, Your Honor.

22 BY MR. CASTELLANO:

23 Q. Mr. Ainsworth, I'm going to show you what's
24 been admitted as Defendant's Rudy Perez' HH. Can you
25 tell us whether this photo or a similar photo was

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1 shown to Mr. Wright?

2 A. It was not.

3 Q. So when you spoke to Mr. Wright, were you
4 just basically testing his memory without the use of
5 anything such as a photograph?

6 A. Well, we were asking him questions. But I
7 did not have that photograph in the interview.

8 Q. And so he described as -- a walker with
9 kind of, as you described it, a seat in the middle;
10 is that accurate to say?

11 A. I believe that was what he said, correct,
12 that it did have a seat.

13 Q. And what did he say about having any
14 knowledge of whether or not Rudy Perez' walker was
15 used in any way in relation to the Molina murder?

16 MR. VILLA: Objection, Your Honor. Outside
17 scope.

18 THE COURT: Overruled.

19 A. I'm sorry. Could you repeat it?

20 Q. What did he say about his knowledge or his
21 belief about the use of Rudy Perez' walker in the
22 Molina murder?

23 A. You know, it was a long interview, and
24 without -- I would be rather hesitant -- there may
25 have been something said about it. I don't recall

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1 the exact details, though.

2 Q. Did you listen to the entire recording last
3 night in anticipation of your testimony?

4 A. No, I only listened to portions.

5 Q. Which portions did you listen to?

6 A. The portion where he talked about, I
7 believe, that there was ten walkers in the wheelchair
8 program that were similar to Mr. Perez'. And there
9 was couple of other portions that I listened to also.

10 Q. And when you say "similar," did you dig
11 down to what he meant by similar, in terms of were
12 they exact duplicates? Were they also just walkers?

13 A. I believe his words were they were exactly
14 the same, but -- and again, that's from my
15 recollection of it.

16 Q. To the best of your recollection, you think
17 there were 10 exactly the same?

18 A. I believe it was up to 10, is what he said,
19 that he recalled working on.

20 MR. CASTELLANO: May I have a moment, Your
21 Honor?

22 THE COURT: You may.

23 Q. Okay. And I understand I'm testing your
24 recollection here, Mr. Ainsworth. What, to the best
25 of your recollection, what do you recall exactly what

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1 Mr. Wright told you about the walkers, starting with
2 Mr. Perez' walker?

3 A. He recalled the walker. He recalled that
4 Mr. Perez relied on the walker to get around. And
5 then he spoke about the wheelchair program and what
6 went on within the wheelchair program. And I believe
7 it was primarily that there was -- I believe he said,
8 like, up to 10 walkers in the program that were like
9 Mr. Perez'.

10 Q. Okay. What did he recall about the color
11 of the --

12 MR. VILLA: I apologize for the
13 interruption. Your Honor, Mr. Perez has to go to the
14 bathroom fairly urgently. Can we take just a short
15 break?

16 THE COURT: All right. Let's just wait for
17 a second.

18 (The Court stood in recess.)

19 MR. VILLA: Your Honor, the U.S. Marshals
20 wanted me to let you know Mr. Perez is having some
21 intestinal problems. That's what's going on right
22 now. I just wanted you to know that.

23 THE COURT: All right. We'll just have to
24 gut through it.

25 MR. VILLA: Thank you, Judge.

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1 MR. CASTELLANO: It's so early.

2 (The Court stood in recess.)

3 THE COURT: All right. Let's go back on
4 the record.

5 All right. Mr. Ainsworth, I'll remind you
6 you're still under oath.

7 Mr. Castellano, if you wish to continue
8 your cross-examination of Mr. Ainsworth.

9 BY MR. CASTELLANO:

10 Q. Okay. Mr. Ainsworth, tell us about the
11 dimensions -- well, first of all, the size of Rudy
12 Perez' walker, as related to you?

13 A. I'm sorry, I couldn't -- I don't think
14 you're speaking into the mic. I couldn't hear you
15 back here.

16 Q. Tell us about the size of Rudy Perez'
17 walker as it was relayed to you by Mr. Wright.

18 A. I don't think he gave the size.

19 Q. Or the shape or the dimensions?

20 A. I don't think he gave any of that either.

21 Q. What about the same questions as to those
22 that were in the wheelchair program?

23 A. None of that either.

24 Q. Was there any discussion about Mr. Wright
25 bringing shanks into the pod from the wheelchair

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1 program?

2 A. There was a discussion about shanks, and
3 how they could have been brought in from the
4 wheelchair program.

5 Q. Okay. Tell us about that, please.

6 MR. VILLA: Objection; outside the scope.

7 THE COURT: Well, I think that it's within
8 the scope. Overruled.

9 A. And I'm sorry, you wanted to know again --

10 Q. Yes, tell us about the discussion of shanks
11 being brought into the pod.

12 A. I believe that what he said was that when
13 you worked in the wheelchair program, there were
14 times when you were searched, and I believe he said
15 there were times when you weren't. And to the best
16 of my recollection, when you went to the restroom,
17 when you were working at the wheelchair program,
18 there were times that you were not searched. So I
19 believe it would be possible then -- I'm paraphrasing
20 here -- but to possibly put shanks in the restroom,
21 and somehow coordinate with the folks in the laundry,
22 to have shanks brought back in. And again that's
23 paraphrasing, so --

24 Q. Was it your understanding that he was
25 either a current or former SNM Gang member?

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1 A. I believe so, yes, sir. I don't remember
2 if he told me that or not. But just from the fact
3 that he was in that pod, that was my understanding.

4 Q. All right. That would have been an SNM
5 pod; is that correct?

6 A. From my understanding.

7 MR. CASTELLANO: Pass the witness, Your
8 Honor -- no, I don't.

9 Q. Did Mr. Wright admit to you that he brought
10 shanks into the pod?

11 A. I don't believe that he did.

12 Q. Is that your best recollection today; is
13 that correct?

14 A. That's correct. And like I said, I did
15 bring -- there is a recording, so --

16 Q. Do you know when you might be able to
17 produce that recording for us?

18 MR. VILLA: Your Honor, I have it. I'm
19 happy to produce it, so we don't have to put the onus
20 on Mr. Ainsworth.

21 THE COURT: Okay.

22 MR. CASTELLANO: That's fine, Your Honor.

23 THE COURT: All right.

24 MR. CASTELLANO: I pass the witness.

25 THE COURT: All right. Thank you,

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1 Mr. Castellano.

2 Anybody else have any redirect of Mr.
3 Ainsworth?

4 All right. Mr. Villa, if you wish to
5 conduct redirect?

6 REDIRECT EXAMINATION

7 BY MR. VILLA:

8 Q. Mr. Ainsworth, did you or I ever ask
9 Mr. Wright whether he, himself, brought shanks into
10 the pod?

11 A. I don't think we did.

12 Q. I just want to back up a little bit. You
13 were aware, because you've been working on this case,
14 that we were having this hearing this week?

15 A. Correct.

16 Q. And in advance of that hearing, did I ask
17 you to come down and testify?

18 A. Yes.

19 Q. Well -- and I don't mean today. I mean,
20 this week, prior to this week?

21 A. Prior to this week, no. You asked me --
22 you called me last night, I believe, about 6:30, 6:00
23 or 6:30 to come testify today.

24 Q. So prior to 6:30 last night, had you
25 anticipated testifying today?

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1 A. I did not.

2 Q. About when was the interview of Mr. Wright?

3 A. August of 2017; August 18, I believe.

4 Q. And since that time, have you conducted
5 many other interviews?

6 A. Yes, I have.

7 MR. VILLA: That's all the questions.

8 THE COURT: Thank you, Mr. Villa.

9 All right. Mr. Ainsworth, you may step
10 down. Thank you for your testimony.

11 What do you want to do with Mr. Wright?
12 Are you satisfied with the record where it is now,
13 and we can move beyond Mr. Wright? Do you want to
14 pick him up this afternoon?

15 MR. VILLA: May I have one moment?

16 THE COURT: Sure.

17 MR. VILLA: Your Honor, see if maybe this
18 proposal would work. I think that the Government
19 intends to put on a couple of witnesses. Can we
20 reserve Mr. Wright and see what happens?

21 THE COURT: Sure. Are you done, otherwise,
22 other than Mr. Wright?

23 MR. VILLA: Yes, Your Honor.

24 THE COURT: All right. Anyone else have
25 anything they want to put on as far as witnesses or

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1 evidence on this motion to suppress? All right. Mr.
2 Castellano, does the Government -- Ms. Armijo, does
3 the Government wish to put on any witnesses or
4 evidence?

5 MS. ARMIJO: Yes, we're going to call James
6 Mulheron.

7 THE COURT: Mr. Mulheron, if you'll come up
8 and stand next to the witness box on my right, your
9 left. Before you're seated, my courtroom deputy, Ms.
10 Standridge, will swear you in.

11 JAMES MULHERON,
12 after having been first duly sworn under oath,
13 was questioned and testified as follows:

14 DIRECT EXAMINATION

15 THE CLERK: Please be seated. State your
16 name, spelling it for the Court.

17 THE WITNESS: James Mulheron,
18 M-U-L-H-E-R-O-N.

19 THE COURT: Mr. Mulheron. Ms. Armijo.
20 BY MS. ARMIJO:

21 Q. Mr. Mulheron, where are you employed?

22 A. Southern New Mexico Correctional Facility.

23 Q. And how long have you worked for -- so do
24 you work for New Mexico Corrections Department?

25 A. Yes, ma'am, I do.

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1 Q. And how long have you worked for them?

2 A. Twenty-five years.

3 Q. And what is your current position?

4 A. Warden at the facility.

5 Q. Okay. And when you say "Southern New
6 Mexico Correctional Facility," is that commonly known
7 as "Southern"?

8 A. Yes, it is.

9 Q. And that is different from what is known as
10 South, which is part of the Penitentiary of New
11 Mexico; correct?

12 A. Correct, it is different.

13 Q. And back in March of 2014, where were you
14 working with Corrections?

15 A. I was a Deputy Warden at the Southern New
16 Mexico Correctional Facility.

17 Q. And were you working on March 7, 2014, when
18 Javier Molina was killed?

19 A. I had worked that day. The incident was
20 after hours.

21 Q. And were you called in that evening?

22 A. Yes, I was.

23 Q. Now -- and did you assist -- or why don't I
24 ask you: What did you do when you were called in?

25 A. Basically, responded to the facility. We

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1 ensured that the crime scene was secure and that we
2 had proper security in the housing unit.

3 Q. And then, after that, did you assist with
4 the investigation as needed?

5 A. As needed, yes, ma'am.

6 Q. Were you ever made aware that shanks were
7 recovered?

8 A. I was.

9 Q. And did you assist in the investigation
10 that night or early morning in reference to shanks?

11 A. That evening, yes, ma'am.

12 Q. And can you tell us what you did?

13 A. One of the things we did, I went to the
14 wheelchair restoration program.

15 Q. Can you tell us what that is? I think
16 we've heard a lot about it, but I don't know that
17 anybody has explained what it is.

18 A. It's a program where the facility receives
19 wheelchairs, walkers that are in bad condition.
20 Those wheelchairs and walkers are then restored to
21 like-new condition. Once we get a significant load
22 of them, say 200, those wheelchairs are shipped to
23 third world countries. And the work is performed by
24 inmates.

25 Q. So the inmates are not working on

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1 wheelchairs for people in Corrections, are they?

2 A. No, ma'am.

3 Q. Okay. So it's a program to basically allow
4 inmates to work on something to send to third world
5 countries?

6 A. A couple reasons we do it. One is to give
7 employment to inmates, and also the goal is that the
8 inmates give something back to other people, that
9 they're doing something useful.

10 Q. Now, why that night did you decide to go
11 and look at the area where the wheelchair program is?

12 A. Based on what the shanks looked like, they
13 weren't -- to me, they felt something consistent with
14 the wheelchair piece, a walker piece. We had, I
15 believe, three or four inmates that lived in that pod
16 that were employed in that program. So it kind of
17 made sense that we would go look in the wheelchair
18 program, where they have access to the metal.

19 Q. Off the top of your head, do you remember
20 the inmates in that program?

21 A. No, ma'am, I don't remember who they were.

22 Q. But at least that night you were made aware
23 of that fact?

24 A. Yes, I was.

25 Q. And had you had an opportunity that evening

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1 to actually look at the shanks that were recovered?

2 A. I believe I looked at photographs of the
3 weapons recovered.

4 Q. And just for the record, what is a shank?

5 A. It's a homemade weapon, made of metal,
6 wood. It's any kind of a piece of contraband
7 fashioned into a weapon.

8 Q. Now, so then you went into the area, and
9 what did you observe?

10 A. We did a thorough search of the wheelchair
11 restoration area. We didn't find any of the metal in
12 there consistent with the shanks that were recovered
13 in the unit. And what I mean, like they weren't
14 consistent, as the shanks were black in color. None
15 of the wheelchairs or walkers had any kind of metal
16 on them that were black, that were consistent with
17 that color.

18 Q. Now, do you remember if there were any
19 walkers on March 7? Let me ask you, did do you it
20 late on March 7 or early March 8?

21 A. I couldn't tell you. It would have been
22 late at night or early, early morning the 8th.

23 Q. And during that search of the wheelchair
24 program area, did you find any walkers?

25 A. I believe at that time there was maybe two

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1 walkers in there. All the other were wheelchairs.

2 Q. And were there any missing pieces from
3 those walkers?

4 A. No, those two walkers were intact.

5 Q. And after that -- and you say that not only
6 you but other people did the search with you?

7 A. Yes, ma'am.

8 Q. Now, after that night, at some other time,
9 did you do further looking into the situation with
10 the shanks?

11 A. Yes.

12 Q. And why don't you tell us about that.

13 A. I'd say a couple days later, a week or so,
14 as the investigation was still going on, and they
15 still hadn't located where the shanks had been taken
16 from, or made from, I remember that there was an
17 inmate in that pod that had a walker. By off chance,
18 I went in there and talked to the inmate.

19 Q. And who was that inmate?

20 A. It was Rudy Perez.

21 Q. All right. And you went in to go see him?

22 A. Yeah. I was doing my rounds at the
23 institution. So when I got --

24 Q. Explain what your rounds are, what you do
25 you do.

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1 A. As a Warden or a Deputy Warden, you do
2 weekly rounds in Level 6 units, housing units,
3 program areas, basically check on the conditions, you
4 make yourself available.

5 Q. And so during the rounds -- and do you do
6 the rounds in the morning, afternoon, at night? When
7 do you do them?

8 A. Typically, first thing in the morning
9 between 8:00 and 10:00 a.m.

10 Q. And so what did you -- you indicated that
11 you went to go talk to Mr. Perez?

12 A. Yeah, as far as my rounds, eventually I got
13 to the housing unit that he was in. So I decided --
14 I talked to Mr. Perez. Naturally, I opened the door.
15 I went in. His walker was present.

16 Q. Okay. Now, I'm going to stop you there.
17 What housing unit was he in?

18 A. That I remember, it was housing unit 2 A.

19 Q. Okay. Now, was that a different housing
20 unit than he was in on March 7, the day of the
21 murder?

22 A. Yes. He was in housing unit 1 A the night
23 of the murder.

24 Q. And so when you went to go see him, he was
25 in 2 A. Where is that, you know, in connection

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1 with -- or how far away is that from where he was?

2 A. It's a couple hundred yards away from the
3 previous housing unit.

4 Q. Is it in the same building?

5 A. No, it's a separate building.

6 Q. Okay. So you went to go see him, and -- in
7 his cell; is that right?

8 A. Yes, ma'am, that's correct.

9 Q. And what did you see?

10 A. The walker was there. And the first thing,
11 I looked at the walker, and I did observe a piece of
12 metal missing.

13 Q. All right. And did you talk to him about
14 that?

15 A. I did. You know, initially, I asked Mr.
16 Perez what happened to the metal. At first he told
17 me he didn't know, and, you know, didn't know what I
18 was talking about. I asked him a few more times, and
19 he told me, "They took it."

20 Q. Okay. And did you ask who took it?

21 A. I asked him who took it. Again, initially,
22 he didn't want to answer. And then he finally told
23 me -- I can't remember exact words, but he said, No
24 disrespect, but they told me, if I said anything,
25 I'll be next.

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1 Q. Okay. And did he indicate to you anything
2 as far as how he would deal with the issue?

3 A. No.

4 Q. Based on that, what did you do?

5 A. Based on that, I left the housing unit. I
6 directed -- I don't know who it was, one of the
7 officers -- to bring the walker up to my office. And
8 at that point, I contacted STIU Ruben Archuleta.

9 Q. Why did you contact him?

10 A. To take photographs of the walker.

11 Q. Now --

12 MS. ARMIJO: I'm going to mark for evidence
13 Exhibits 27, 28, and 29, which are similar to defense
14 exhibits, except they have a sticker on them. So
15 I'll move for their admission.

16 THE COURT: Any objection?

17 MR. VILLA: No, Your Honor.

18 THE COURT: Any objection from any other
19 defendants? Not hearing any, Government's Exhibits
20 27, 28, and 29 will be admitted into evidence.

21 Q. All right. And I'm showing you Exhibit
22 Number 27. Can you see that photograph?

23 A. Yes, ma'am.

24 Q. All right. And I'm looking at the top
25 here. There is a sticker on it. And do you have any

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1 reason to believe that -- so you indicated that you
2 had STIU Officer Ruben Archuleta take the
3 photographs?

4 A. Yes, ma'am.

5 Q. All right. And did you do anything -- did
6 you direct anyone to do anything with the walker
7 prior to him taking pictures of it?

8 A. No, I did not.

9 Q. Did somebody move it from the cell to
10 another location?

11 A. Yes.

12 Q. Okay. And how did that happen?

13 A. Correctional officer -- the housing, the
14 rover picked it up and took it from the cell to my
15 office.

16 Q. All right. And then did Ruben Archuleta
17 actually take a photograph of it?

18 A. Yes, ma'am.

19 Q. And then, did you make any further requests
20 at that time?

21 A. Yeah. I believe I contacted STIU, and I
22 believe it was Officer Ernie Holguin, and I provided
23 him with that additional information I got from Rudy
24 Perez.

25 Q. And what did you ask him to do?

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1 A. Conduct an interview.

2 Q. And after that, did you -- was that your
3 way of getting follow-up done on it, so to speak?

4 A. Yes, ma'am, that was my follow-up.

5 Q. Now, do you know what happened to the
6 walker?

7 A. I do not know, ma'am.

8 Q. Did it stay in your office for some period
9 of time, or you don't know?

10 A. No. I really don't remember. I don't
11 believe it did.

12 Q. Okay. And as I'm showing these pictures,
13 is that how it appeared? I'm showing Exhibit 28. Do
14 you know what we're looking at here?

15 A. Yes, ma'am, I do.

16 Q. What is it we're looking at?

17 A. The bottom of a walker, the cross-members,
18 the support things. I'm not sure what the
19 terminology would be. But the two pieces -- those
20 are actually two separate pieces of metal that are
21 tied together.

22 Q. Okay. And when you say -- and I'm showing
23 you Exhibit 29. What is it that we're looking at?

24 A. It's another view of the cross-member.

25 They're tied together with -- I forget what it was, a

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1 washcloth or something. The missing piece of metal
2 would have run from one side to the other and would
3 have held those two pieces together.

4 Q. Okay. So you say "from one side to the
5 other," you mean where this -- and I'm looking at the
6 photograph, on the left side where there is a white
7 piece of cloth, to the other side; is that correct?

8 A. That's correct.

9 Q. And is that what was obvious to you when
10 you went in the cell?

11 A. Yes. The first thing that brought my
12 attention to it was the way it was tied off. And
13 then I looked down, and that cross-member was
14 missing.

15 Q. Now, you indicated that there was a couple
16 other walkers in the wheelchair program. Were they
17 the same color or were they a different color?

18 A. No, ma'am. And that's one of the things;
19 the two that were in that program were stainless
20 steel, where this one was painted black.

21 Q. Okay. So --

22 A. And they were different models, they were
23 stainless steel.

24 Q. As we're looking at -- and I'm putting up
25 Exhibit 27. Were there any walkers in the wheelchair

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1 program when you did your review of it March 7/8 that
2 were consistent with the wheelchair that is depicted
3 on Exhibit 27?

4 A. No, there was not.

5 Q. And just so that we're clear, Exhibit 27,
6 whose wheelchair was this?

7 A. That was Rudy Perez.

8 MS. ARMIJO: And if I may just have one
9 moment, Your Honor?

10 THE COURT: Certainly.

11 Q. Now, are you also familiar with the video
12 system that was in place at Southern back in March of
13 2014?

14 A. Somewhat familiar with it.

15 Q. Specifically, are you familiar with how
16 long the retention was?

17 A. Yes, ma'am.

18 Q. And explain to us how long the taping, so
19 to speak, or the video portion would be retained?

20 A. Typically, we retained anywhere from 22 to
21 about 50 days of video. It would depend on which
22 DVR; if a DVR had 10 cameras hooked up to it or five
23 cameras, which would kind of determine the retention
24 on it.

25 Q. And would how active an area also determine

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1 the retention?

2 A. It could. The more area, the more
3 movement, the more storage space it will take up,
4 versus if a camera was just pointed off into, say,
5 the rec yard, where there is limited movement.

6 Q. And so why does it not retain? Does it
7 tape over it, or what happens?

8 A. Yeah, because of the storage space that
9 would be required to retain anything more than that,
10 basically what the system does -- anywhere from 22 to
11 50 days it will start recording over it.

12 Q. Now, is there -- and I believe the defense
13 has marked one -- is there a policy for retaining
14 that footage that's just there recorded?

15 A. No, ma'am.

16 Q. Okay. Now, I believe yesterday the defense
17 had pointed out in one of the policies that there is
18 a 10-year retention of something -- of either DVDs or
19 CDs. Do you know what that's in reference to?

20 A. I would view that in reference to if there
21 is actually an incident with a misconduct report, and
22 you're going to use the video recording as evidence,
23 so you would download it onto a disc, and the
24 retention for that disc would be the 10 years.

25 Q. All right. So just so that we're clear,

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1 Corrections is not required to keep all footage that
2 they ever record in all facilities for 10 years, are
3 they, by policy?

4 A. No, ma'am, we are not.

5 Q. Okay. It's just items that are downloaded
6 and kept as part of either an investigation, or for
7 whatever reason?

8 A. Investigation criminal matter, in-house
9 behavioral management problem, something that that
10 item is going to be used as evidence.

11 MS. ARMIJO: All right. I have no further
12 questions. Thank you.

13 THE COURT: Thank you, Ms. Armijo.

14 Let me see if any of the defense lawyers
15 have questions of Mr. Mulheron before Mr. Villa does.

16 All right. Mr. Villa, if you wish to
17 conduct cross-examination of Mr. Mulheron, you may do
18 so at this time.

19 MR. VILLA: Thank you, Your Honor.

20 THE COURT: Mr. Villa.

21 EXAMINATION

22 BY MR. VILLA:

23 Q. Good morning, Mr. Mulheron.

24 A. Good morning.

25 Q. So let me make sure I understand. You

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1 don't know what happened to the walker?

2 A. No, sir, I don't.

3 Q. It was brought to your office?

4 A. Yes, it was.

5 Q. After you went to Mr. Perez' cell and spoke
6 to him?

7 A. Yes.

8 Q. After the Javier Molina murder?

9 A. Yes.

10 Q. Within -- I think you testified -- it was a
11 week or so; is that right?

12 A. I believe it was a week or so.

13 Q. And you asked STIU Officer Archuleta to
14 photograph the walker?

15 A. I did.

16 Q. In your office?

17 A. Yes.

18 Q. Because you thought it was important?

19 A. Yes.

20 Q. You thought it might have something to do
21 with this Molina homicide?

22 A. Possibly.

23 Q. Okay. And this is, well, almost three
24 years ago; a little less than three years ago? A
25 long time ago, right?

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1 A. Right.

2 Q. But you don't know what happened to the
3 walker?

4 A. I don't.

5 Q. You don't know where it went?

6 A. I do not.

7 Q. But you seem to remember pretty clearly the
8 details about the two other walkers that were in the
9 wheelchair program; do I understand that right?

10 A. Yes, you do.

11 Q. Okay. That memory is good?

12 A. I remember that, yes, sir.

13 Q. All right. Let me ask you this: Did you
14 document taking Mr. Perez' walker from him?

15 A. I did not.

16 Q. Why not?

17 A. I didn't see no reason in it.

18 Q. I'm sorry?

19 A. I didn't see no reason to document that I
20 took it.

21 Q. Well, it's true that there is a policy for
22 confiscation of inmate property, isn't there?

23 A. There is.

24 Q. And doesn't that policy say that you're
25 supposed to give an inmate a receipt when you

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1 confiscate their property?

2 A. Well, I don't think it addresses State
3 property.

4 Q. I'm sorry?

5 A. The walker was State property.

6 Q. Okay. Did you think that it might have
7 been important to document potential evidence in a
8 homicide?

9 A. I did. Like I said, that's why I contacted
10 STIU.

11 Q. At the time, you were the Deputy Warden?

12 A. Correct.

13 Q. Let me make sure I have this right. You
14 think that you went to see Mr. Perez about a week
15 after?

16 A. Yes.

17 Q. So the homicide occurred March 7?

18 A. Correct.

19 Q. And the week after would have been
20 approximately March 14?

21 A. Yes.

22 Q. You don't think it was sooner than that?

23 A. I don't -- that I recall, it was March 14.

24 Q. That you saw Mr. Perez?

25 A. Yes.

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1 Q. All right. And then you asked Mr. Holguin
2 to go interview him?

3 A. I did.

4 Q. Do you know how soon Mr. Holguin
5 interviewed Mr. Perez after you asked him to do that?

6 A. I do not.

7 Q. Did you see a memo or documentation from
8 Mr. Holguin about his interview?

9 A. Not that I recall.

10 Q. Did he report back to you after he
11 conducted the interview?

12 A. No.

13 Q. Now, you were aware that the State Police
14 were conducting investigation into this homicide,
15 right?

16 A. Correct.

17 Q. And actually, there were some briefings
18 that took place in connection with their
19 investigation?

20 A. I'm sure there were.

21 Q. Were you present at those briefings?

22 A. I could have been. I don't recall. I
23 probably was, but I don't recall specifically.

24 Q. Okay. Well, let's assume for sake of
25 argument that there might have been more than one.

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1 Do you think you attended more than one briefing?

2 A. I probably did.

3 Q. Okay. And you attended at least one
4 briefing?

5 A. Yeah, absolutely.

6 Q. And maybe two?

7 A. I would say I did, at least one.

8 Q. And at that briefing, members of the State
9 Police were present?

10 A. Correct.

11 Q. Did that also include Agent Palomares?

12 A. I believe so.

13 Q. Now, were you aware of what happened with
14 the video of the Javier Molina homicide, how that was
15 captured and provided to the State Police?

16 A. No, I do not.

17 Q. You didn't have any involvement in that?

18 A. No.

19 Q. Let me back up just a little bit. Did you
20 review anything to prepare for your testimony today?

21 A. Actually, I don't believe I reviewed
22 anything. Well, I reviewed a memorandum on the
23 cameras, on which cameras were operational and not
24 operational.

25 Q. Cameras within the blue pod?

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1 A. That was facility-wide.

2 Q. Oh, facility-wide?

3 A. Yes.

4 Q. And where is that memorandum?

5 A. I believe it's in the room in the back.

6 Q. Who prepared that memorandum?

7 A. I think it was Deputy Warden Edgman.

8 Q. Why did you review that?

9 A. Just to see what cameras were working or
10 not, so I would be familiar with -- if I was asked
11 which cameras were working that day of the murder, I
12 would know.

13 Q. Did you review anything else?

14 A. No.

15 Q. Did you meet with members of the
16 prosecution team before your testimony?

17 A. Yes, I did.

18 Q. When did you do that?

19 A. This morning.

20 Q. And was that to discuss your testimony this
21 morning?

22 A. It was.

23 Q. Did you meet with them before this morning
24 regarding this case?

25 A. No, I haven't.

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1 Q. This was the first time?

2 A. This is the first time I've met them.

3 Q. And that includes the three attorneys here
4 sitting at the counsel table, as well as FBI Agent
5 Acee?

6 A. Yes.

7 Q. Did you bring anything else with you
8 besides that memorandum you just discussed?

9 A. No.

10 MR. VILLA: Your Honor, I'd ask that the
11 Court ask Mr. Mulheron to produce that memorandum.

12 THE COURT: Any thoughts on that, Ms.
13 Armijo?

14 MS. ARMIJO: Your Honor, he didn't bring
15 it. I gave it to him. He actually is filling in --
16 was coming in to fill in for a witness that we had
17 coming from Santa Fe, but was snowed in. And so I
18 don't mind giving it to them.

19 THE COURT: Mr. Villa, I think she's
20 handing you the memo.

21 MS. ARMIJO: I provided it to him. But I
22 believe we've called in the person that wrote the
23 memo to come testify, and he's on his way here.

24 MS. JACKS: Is there a Bates number on
25 that?

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1 MS. ARMIJO: It is not. It's not been
2 disclosed.

3 BY MR. VILLA:

4 Q. Mr. Mulheron, when you went to Mr. Perez'
5 cell, you testified that he was in a different pod;
6 correct?

7 A. Correct.

8 Q. And which pod was that again?

9 A. The pod, I don't know specifically. I
10 think it was blue pod. But the housing unit was 2 A,
11 housing unit 2 A.

12 Q. So the homicide was housing unit 1 A where
13 Javier Molina was allegedly murder, right?

14 A. Correct.

15 Q. In blue pod housing unit 1 A?

16 A. Yes.

17 Q. And when you went to see Mr. Perez, it was
18 in housing unit 2 A; you're not sure which pod?

19 A. Right. I'm not sure. I believe it was
20 blue pod also.

21 Q. Which cell was it?

22 A. I don't recall. It was on the top tier.

23 Q. He was on the top tier?

24 A. Or the bottom, I don't remember.

25 Q. So you don't remember which tier?

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1 A. No.

2 Q. Did you take a photograph of the walker as
3 it was in Mr. Perez' cell?

4 A. I did not.

5 Q. And I think, if I understand correctly, you
6 didn't actually take the walker; you had Officer
7 Archuleta do that?

8 A. No, I had a housing unit officer take it.

9 Q. The housing unit officer in that pod?

10 A. Yes.

11 Q. He took it to your office?

12 A. Correct.

13 Q. Okay. It's your testimony that this is the
14 walker -- I'm showing you Government's Exhibit 27 --
15 that was taken to your office?

16 A. Yes.

17 Q. Was that in your office?

18 A. It appears to be. Well, yeah, it's in my
19 office.

20 Q. Your office have wood paneling on the
21 walls?

22 A. Yes.

23 Q. And I'll show you another picture, Exhibit
24 29. Do you recognize that carpeting from your
25 office?

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1 A. I do.

2 Q. Now, there is stickers here on the top that
3 indicate it's from Inmate Rudy Perez; it has a date,
4 a time, who the photo was taken by. Do you know
5 where this particular photo with the stickers on it
6 came from?

7 A. Ruben Archuleta.

8 Q. Do you know how they came to be in the
9 Government's possession in this case?

10 A. I don't.

11 Q. When was the last time you saw these
12 photographs?

13 A. This morning.

14 Q. When was the first time you saw these
15 photographs?

16 A. I would say -- I don't know the first time.

17 Q. Okay. So you did review these photographs
18 before your testimony?

19 A. I did, yes.

20 Q. So aside from the memo about the cameras,
21 and these photographs, did you review anything else
22 for your testimony?

23 A. No.

24 Q. How long did the walker stay in your
25 office?

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1 A. I don't remember.

2 Q. Do you know where the walker was from the
3 time of Mr. Molina's homicide until you had the
4 housing officer take it from Mr. Perez?

5 A. No, I don't.

6 Q. Now, would you agree with me -- maybe you
7 can't see it quite as well in 27 -- but in 29, it
8 looks like the outer metal parts of the walker, for
9 lack of a better word, have some kind of coloring,
10 red or black coloring?

11 A. Yes.

12 Q. Do you see that there?

13 A. Are you talking about the pieces as a
14 whole, or --

15 Q. Yeah, it's like it's painted or something,
16 decorative painting?

17 A. I see black.

18 Q. Okay. So let me like direct your attention
19 to -- see where I put the arrow?

20 A. Right.

21 Q. So that post appears to me to have two
22 different colors on it, maybe a shade of red and
23 black?

24 A. It's hard to say. Possibly looks like a
25 flash from the camera.

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1 Q. Okay.

2 A. I think my copy is a little darker.

3 Q. Let me show you --

4 A. As far as it's coming up on the screen.

5 Q. Maybe it's the screen.

6 MR. VILLA: May I approach, Your Honor?

7 THE COURT: You may.

8 Q. See if that looks a little better.

9 A. Okay.

10 Q. Does it look like it has some red coloring
11 on there?

12 A. It looks like it possibly could.

13 Q. Do you remember that's what it looked like?

14 A. I remembered it as being black.

15 Q. You talked about the alleged shanks that
16 were recovered. You didn't actually see the shanks
17 yourself; you saw photographs of them?

18 A. Correct.

19 Q. Let me show you Defendants' RP-BB. Do you
20 recognize that?

21 A. Yes, I do.

22 Q. Does that look like one of the shanks that
23 was recovered?

24 A. It does.

25 Q. I'm going to show you a closer up picture

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1 of that RP-DD. Do you remember seeing a picture like
2 that?

3 A. I believe I might have, yes.

4 Q. And I don't know, maybe the glare is not
5 any good, but can you see any coloring near the tip
6 of the shank, where I've put the arrow there?

7 A. It appears to be blue.

8 Q. Blue, okay.

9 You did not try to -- well, we know you
10 didn't because you never got the shanks; correct?

11 A. Correct.

12 Q. Did you ever ask anybody to look at the
13 shanks and see if they matched or were similar to the
14 metal on Mr. Perez' walker?

15 A. No, I did not.

16 Q. And do you know if anybody actually tried
17 to do that?

18 A. No, I do not know that.

19 Q. Have you ever had potential evidence of a
20 homicide in your office before?

21 A. I don't believe so.

22 Q. Have you ever had evidence of any crime in
23 your office before?

24 A. I doubt it.

25 Q. I'm sorry?

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1 A. I doubt it.

2 Q. Is there any procedure that you have for
3 handling evidence that you have in your office?
4 Like, what's supposed to happen to it?

5 A. Typically, it would be taken in possession
6 by whoever is investigating it.

7 Q. That would be, in this case, the State
8 Police?

9 A. The State Police or STIU.

10 Q. All right. But you don't know what
11 happened to the walker at your office?

12 A. No, I don't.

13 Q. One day it was there; one day it wasn't?

14 A. It was there. I know somebody picked it
15 up. I believe it was Officer Ernie Holguin. But I
16 couldn't tell you a hundred percent.

17 Q. Do you know if Officer Holguin documented
18 in any way his dealings with this walker?

19 A. No, I don't.

20 Q. What about Officer Archuleta?

21 A. I don't know if he did or not.

22 Q. So you haven't seen any documentation
23 demonstrating a chain of custody for this walker?

24 A. No.

25 Q. When you went over to the wheelchair

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1 program, and you say you saw just a couple of
2 walkers, did you take photographs of them?

3 A. No.

4 Q. Did you measure them in any way?

5 A. No.

6 Q. What about Mr. Perez' walker, did you
7 measure it in any way?

8 A. I did not.

9 Q. Did you ask anybody else to?

10 A. No, I didn't.

11 Q. Same question with the ones in the
12 wheelchair program. Did you measure those, or did
13 you ask anyone else to measure those?

14 A. No, I did not.

15 Q. Now, the reason you took the walker is you
16 thought perhaps it might have been related to the
17 homicide of Javier Molina, right?

18 A. Yes.

19 Q. Mr. Perez didn't tell you that?

20 A. No.

21 Q. He just told you they took it?

22 A. Told me that they took it.

23 Q. He didn't tell you when they took it?

24 A. No, he didn't.

25 Q. And you knew that there were other shanks

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1 that made their way into blue pod where Javier Molina
2 was murdered, right?

3 A. No.

4 Q. So you didn't think that shanks were
5 getting into that pod?

6 A. As far as how?

7 Q. Just generally.

8 A. I didn't know. Do I think? Yeah, I
9 probably did.

10 Q. All right. And did you have a belief that
11 perhaps metal from the wheelchair program was being
12 brought into that pod to be made into shanks?

13 A. No.

14 Q. You didn't have any idea that that might
15 have been happening?

16 A. I didn't have any evidence it was
17 happening. When you're dealing with an inmate
18 population, there is always a belief that it's
19 happening.

20 Q. Okay. So it's something you're on the
21 lookout for?

22 A. Yes.

23 Q. It's a security concern?

24 A. Yes.

25 Q. So you have to be wary of it?

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1 A. Correct.

2 Q. You knew there were several inmates in the
3 pod where Javier Molina was murdered that were
4 working in the wheelchair program, right?

5 A. Yes.

6 Q. And you knew there was a possibility they
7 may have taken metal from the wheelchair program into
8 the pod, perhaps for Mr. Molina's assault, but also
9 earlier in time?

10 A. There is always that belief. I don't know
11 if it was true or not.

12 Q. When did the wheelchair program begin?

13 A. I couldn't really tell you. I can guess.

14 Q. I don't want you to guess. But were you
15 present at Southern when the wheelchair program
16 began?

17 A. I was.

18 Q. Can you tell me if it began prior to the
19 year 2014?

20 A. It did.

21 Q. It did?

22 A. It did.

23 Q. Okay. And how long were individuals, if
24 you know, in the blue pod where Javier Molina was
25 murdered working in the wheelchair program?

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1 A. I would believe a couple of months.

2 Q. And you knew that throughout the life of
3 the program, if you will, walkers and wheelchairs
4 were coming in and out of there; correct?

5 A. Correct.

6 Q. And they were rehabbing them, or perhaps
7 using some for spare parts, and then they would rehab
8 them and send them off to third world countries, as
9 you testified?

10 A. Correct.

11 Q. Both walkers and wheelchairs?

12 A. Correct.

13 Q. So you knew it was possible that somebody
14 at some point in time took some metal from the
15 wheelchair program, and got it to the blue pod?

16 A. It's possible they could attempt to. I
17 can't say that they did.

18 Q. No, I'm not asking if you knew they did.

19 A. There is always a possibility. It's a
20 prison. You know, it is what it is.

21 Q. At the time you were investigating the
22 Molina homicide and talking to Mr. Perez, you knew
23 there was a possibility?

24 A. Correct.

25 Q. And that there was a possibility that the

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1 shanks used on Mr. Molina may have come from Mr.
2 Perez' walker?

3 A. Correct.

4 Q. And have come from a different walker?

5 A. Correct.

6 Q. Not necessarily the two that you saw when
7 you went, but from an earlier point in time?

8 A. Correct.

9 Q. Now, let's go back to the video. You said
10 that a video can hold images from approximately --
11 did you say 50 or 15 -- at the high end?

12 A. At the high end, it was 50.

13 Q. And then the shorter end was how long?

14 A. Twenty-two days.

15 Q. And you didn't know when Mr. Perez -- when
16 he told you they took it, you didn't know when that
17 happened?

18 A. No, I did not.

19 Q. But you didn't go to the video to try to
20 determine if you could see somebody perhaps going
21 into Mr. Perez' cell and taking something from his
22 walker?

23 A. No, I did not.

24 Q. But you didn't ask anybody else to do that?

25 A. No, I didn't specifically ask him to do

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1 that.

2 Q. But you knew your cameras were capable of
3 going back in time, that maybe you could have seen
4 that?

5 A. Correct.

6 Q. Are you aware that an after action review
7 was done in connection to the Javier Molina homicide?

8 A. Yes.

9 Q. Were you involved in that?

10 A. I don't believe I was.

11 Q. So you just knew they were there doing it,
12 but you didn't get involved yourself?

13 A. I don't believe I did.

14 Q. When you say you don't believe, what do you
15 mean?

16 A. I mean, I could have talked to them. They
17 might have interviewed me. I don't remember.

18 Q. I see. But you weren't actively conducting
19 an investigation yourself?

20 A. No. That would have been done by
21 individuals from outside of the institution.

22 Q. Did you ever review a report concerning
23 that after action review?

24 A. I don't believe I did. That would have
25 been sent to the Warden.

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1 Q. Did you ever participate in a meeting
2 concerning the findings or conclusions of that after
3 action review?

4 A. Not that I remember.

5 Q. Or briefing of any kind?

6 A. That would have been done with the Warden.

7 Q. I mean, did the Warden ever come to you and
8 say: We had a briefing from this after action
9 review, and these are the things we think we should
10 do differently?

11 A. Not in that way. She would have come and
12 say, We're going to institute this new thing, so
13 let's start it on so and so date, or we're going to
14 do this differently.

15 Q. Did she do that?

16 A. I don't remember if she did or not.

17 Q. Did you ever get an email or memo about
18 changes that were being made?

19 A. I don't recall if I did or not.

20 Q. Who was responsible for determining who
21 could work in the wheelchair program?

22 A. It would have been the housing unit
23 manager.

24 Q. So for this particular case that's housing
25 unit 1 A?

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1 A. Correct.

2 Q. And the manager of that housing unit can
3 decide which inmates in their housing unit are
4 allowed to work there?

5 A. Yes.

6 Q. Is that decision reviewed by anybody or --

7 A. No, that's the job of the housing unit
8 manager.

9 Q. Do you know Adam Vigil?

10 A. Adam Vigil, I do.

11 Q. From Santa Fe. I believe he's the STIU
12 coordinator?

13 A. Yes.

14 Q. Were you aware that he had reviewed the
15 wheelchair program and found that the security there
16 was deficient, after the homicide?

17 A. No, I wasn't.

18 Q. Is that the first time you've heard that?

19 A. It is.

20 Q. Okay. Now, are you aware that Officer
21 Holguin, other than interviewing Mr. Perez, had also
22 conducted other interviews of inmates concerning the
23 Javier Molina homicide?

24 A. I was aware, yes.

25 Q. You knew he was doing that while -- in the

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1 aftermath of the homicide?

2 A. Yes.

3 Q. Did he talk to you about what he learned in
4 his interviews?

5 A. No.

6 Q. Did he provide you memos of those
7 interviews?

8 A. No. And it wouldn't --

9 Q. I'm sorry?

10 A. It wouldn't go to me.

11 Q. Why not?

12 A. I'm the Deputy Warden.

13 Q. Who would it go to?

14 A. To the Warden.

15 Q. Anyone else?

16 A. To the STIU coordinator, somebody within
17 STIU chain of command.

18 Q. What about the State Police who were
19 conducting the investigation?

20 A. Maybe not. I don't know. That would be
21 better left answered to the Warden or STIU.

22 Q. Or Officer Holguin?

23 A. Correct.

24 Q. When you went to the wheelchair program,
25 other than looking at the two walkers that you said

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1 were there, did you do any sort of inventory of what
2 you had on hand there?

3 A. We went through the inventory. We didn't
4 just look at the walkers. We looked at the
5 wheelchairs, the tools, spare parts.

6 Q. When you said "we," who else was with you?

7 A. I don't recall. It would have been Deputy
8 Warden Edgman; there would have a few correctional
9 staff.

10 Q. So you looked at what was there on hand in
11 the wheelchair program?

12 A. Correct.

13 Q. Did you look at documentation that was
14 there?

15 A. We looked at the tool inventory.

16 Q. Tool inventory. What does the tool
17 inventory consist of?

18 A. Consists of an inventory of the tools.

19 Q. Does it consist of an inventory of the
20 wheelchairs or walkers?

21 A. No.

22 Q. Was there an inventory of the wheelchairs
23 or walkers?

24 A. I don't recall there being one.

25 Q. So you think maybe there wasn't one?

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1 A. It's possible.

2 Q. As you sit here today, you're not aware of
3 an inventory that says what walkers, what wheelchairs
4 came in or went out?

5 A. No.

6 Q. And then was there an inventory of any kind
7 of the spare parts that were being used to
8 rehabilitate the walkers or wheelchairs?

9 A. No. What they had was basically bins with
10 spare parts in it. But I don't recall any
11 inventories.

12 Q. Okay. And, of course, without an
13 inventory, you wouldn't necessarily be able to know
14 what was supposed to be there and what was missing?

15 A. Correct.

16 Q. Did you know that the agent who was
17 investigating the homicide in this case had a belief
18 or understanding that perhaps the shanks used in the
19 Molina homicide came from a wheelchair?

20 A. No, I did not.

21 Q. Did you ever have an understanding that
22 they might have come from a wheelchair?

23 A. I did not.

24 Q. Did you ever tell anybody that it came from
25 a wheelchair?

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1 A. No, I did not.

2 Q. Did you ever speak to Agent Palomares, the
3 investigator from the State Police?

4 A. I believe I may have just greeted him the
5 night -- that evening. But I've dealt with him a few
6 times on different issues, but nothing besides: Hi,
7 and how are you doing, and this is what we got. And
8 I think our conversation that night was very limited
9 to just a greeting.

10 Q. Did you talk to him after that?

11 A. I don't believe I've talked to him beside,
12 I seen him this morning and talked to him.

13 Q. You didn't tell him about the walker that
14 you took from Mr. Perez?

15 A. I don't think I had any more contact with
16 him after that night.

17 Q. Did you tell anybody else besides Officer
18 Archuleta about the walker you took from Mr. Perez?

19 A. I would have told the Warden.

20 Q. Told the Warden. And the Warden at the
21 time was who?

22 A. Melissa Ortiz.

23 Q. Do you remember what Ms. Ortiz told you in
24 response to that?

25 A. I don't remember specifically what she

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1 said.

2 Q. She didn't ask you to document it in any
3 way?

4 A. No.

5 Q. Are there procedures or protocols that you
6 follow when taking evidence that might be from a
7 crime occurring in the prison?

8 A. Yes.

9 Q. Can you tell me what those are?

10 A. Typically, it's documented with a chain of
11 custody.

12 Q. Say again?

13 A. It's documented with a chain of custody,
14 typically.

15 Q. But this particular walker, you're not
16 aware of any documentation of a chain of custody?

17 A. No.

18 Q. What about Archuleta's photography? Are
19 you aware of a report documenting that he photoed
20 this walker?

21 A. I'm not.

22 MR. VILLA: May I have just a moment, Your
23 Honor?

24 THE COURT: You may.

25 MR. VILLA: May I approach, Your Honor?

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1 THE COURT: You may.

2 Q. I'm going to show you the memo that you
3 reviewed with respect to the video cameras.

4 A. Yes.

5 Q. And it indicates there about the cameras in
6 the blue pod where Mr. Molina was murdered; correct,
7 is that right?

8 A. It does.

9 Q. And it has in parentheses "poor quality"?

10 A. It does.

11 Q. What does that mean?

12 A. Maybe poor quality film. One of the things
13 is the recordings are delayed. So when you see
14 someone move, it kind of skips a little bit. So some
15 of them are more distorted than others. I couldn't
16 answer for sure what "poor quality" -- I didn't write
17 the document, so I wouldn't --

18 Q. Do you know if all the cameras in the pod
19 were working on March 7, 2014?

20 A. I don't remember specifically. I believe
21 two, at least two were.

22 Q. Now, were you aware that a site visit of
23 the wheelchair program, as well as the blue pod, was
24 conducted by the defense attorneys and others in this
25 case?

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1 A. I am.

2 Q. And I believe that the first one occurred
3 in December. I may be a little off on my times.
4 Does that sound about right?

5 A. I'll take your word. I don't remember the
6 specific dates or times.

7 Q. Were you familiar with the inventory at the
8 time in the wheelchair program when we did our site
9 visit?

10 A. No.

11 Q. Did you know that at the time, during the
12 site visit, there wasn't any walkers in there?

13 A. I did not know that.

14 Q. Now, the second site visit was conducted by
15 smaller members of the defense team. I think that
16 was in the summertime in June. Do you remember that?

17 A. Not specifically. But I know there was a
18 couple of visits.

19 Q. Okay. And were you familiar with the
20 inventory in the wheelchair program at that time?

21 A. No.

22 Q. Did you know that there were quite a few
23 walkers during that second visit?

24 A. No.

25 Q. Had you been in the wheelchair program at

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1 all as part of your job duties?

2 A. I go randomly.

3 Q. You go randomly?

4 A. I do.

5 Q. Let me show you -- this is a photo on a
6 laptop -- forgive me -- from the wheelchair program.

7 Can you see that okay?

8 A. I do.

9 Q. And there are, looks to me, half a dozen or
10 so walkers in there. Would you agree?

11 A. Yes.

12 Q. Have you been in the wheelchair program at
13 other times when there is quite a few walkers in
14 there?

15 A. I don't remember specifically. There could
16 have been.

17 MR. VILLA: I'll pass the witness, Your
18 Honor.

19 THE COURT: Thank you, Mr. Villa.

20 Let's go back to Mr. Castellano -- Ms.
21 Armijo, do you have redirect of Mr. Mulheron?

22 MS. ARMIJO: No, Your Honor. No questions.

23 MS. JACKS: Your Honor, I'm going to ask a
24 few questions, but I'd like to confer with Mr. Villa.

25 MR. VILLA: Sure.

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1 THE COURT: All right. Let me find out for
2 the record who is on the telephone.

3 MR. CASTLE: Jim Castle.

4 THE COURT: All right. Mr. Castle, good
5 morning. Who else?

6 MR. CASTLE: Good morning, Your Honor.

7 THE COURT: Who is that?

8 MR. CASTLE: That was still Mr. Castle,
9 just saying good morning.

10 THE COURT: Oh, okay. Just Mr. Castle is
11 on the phone. All right.

12 MR. VILLA: Your Honor, I may have a couple
13 more questions, if the Court would indulge me.

14 THE COURT: All right.

15 BY MR. VILLA:

16 Q. You testified that Mr. Perez, when you were
17 asking him about the missing part of his walker,
18 said, No disrespect, but if -- they told me if I said
19 anything to anybody, I'd be next.

20 A. Yes.

21 Q. And that occurred while you were in Mr.
22 Perez' cell in the other housing unit?

23 A. Correct.

24 Q. And you didn't write that down?

25 A. I didn't.

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1 Q. You didn't document that?

2 A. I didn't. I didn't have a need to.

3 Q. Well, you understood that the State Police
4 were investigating the Javier Molina homicide;
5 correct?

6 A. Correct.

7 Q. And you had a thought or a belief perhaps
8 that one of the shanks may have came from Mr. Perez'
9 walker?

10 A. Correct.

11 Q. And you also knew that the FBI was involved
12 in the investigation?

13 A. At that time, no, I did not.

14 Q. Well, the FBI was conducting interviews
15 within a couple of days of Javier Molina homicide of
16 inmates at your facility, were they not?

17 A. Not that I know of.

18 Q. All right. But it's your testimony that
19 you did not have a need to document Mr. Perez'
20 statement?

21 A. I didn't. That's why I contacted STIU.

22 Q. Did you tell STIU about the statement?

23 A. I did.

24 Q. Did STIU -- well, who did you tell?

25 A. Ernie Holguin.

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1 Q. Did Ernie Holguin document that anywhere?

2 A. You'd have to ask Ernie Holguin.

3 Q. And after you talked to Mr. Perez, you went
4 back to your office?

5 A. I did.

6 Q. And had the walker brought to your office?

7 A. I did.

8 Q. In your office you have a computer?

9 A. I do.

10 Q. And can you type on that computer?

11 A. Yes.

12 Q. You had paper there?

13 A. Probably copier paper.

14 Q. Okay. That you could print out a document,
15 if you wanted to type a document?

16 A. If I wanted to.

17 Q. And a notepad, you can write things down?

18 A. I don't have a notepad.

19 Q. No notepad?

20 A. No.

21 Q. Pen and paper?

22 A. I have a pen.

23 Q. Are you allowed to have your cellphone in
24 the office?

25 A. No.

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1 Q. You have to keep it in the car?

2 A. At that time -- are you referencing --
3 which date?

4 Q. The day after -- well, the day you talked
5 to Mr. Perez and then went back to your office, were
6 you allowed to have a cellphone?

7 A. No.

8 Q. Is that because you have to keep it outside
9 in the car?

10 A. Correct.

11 Q. Okay. So you have the computer, pen and
12 paper, but you didn't document that Mr. Perez told
13 you this?

14 A. That's correct.

15 MR. VILLA: Those are all the questions I
16 have.

17 THE COURT: All right. Thank you, Mr.
18 Villa.

19 Ms. Jacks, did you have anything?

20 MS. JACKS: Just a few follow-ups.

21 THE COURT: All right. Ms. Jacks.

22 EXAMINATION

23 BY MS. JACKS:

24 Q. Mr. Mulheron, when is the first time that
25 you told anybody associated with law enforcement, the

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1 FBI, or the prosecution about that statement that you
2 claim Mr. Perez made?

3 A. A couple days ago.

4 Q. So sometime in December of 2017?

5 A. Correct.

6 Q. And I think Mr. Perez (sic) asked you some
7 questions. You didn't have any notes or anything
8 that you referred to to refresh your memory about
9 that alleged statement from Mr. Perez?

10 A. No.

11 Q. You just, two or three days ago, remembered
12 it out of the blue, and told the Government?

13 A. I didn't remember it out of the blue. It
14 was the first time I was asked about it.

15 Q. You're aware -- in your position, you were
16 aware that the FBI was investigating the homicide of
17 Javier Molina, right?

18 A. At that time?

19 Q. At any time?

20 A. Well, I'm aware now.

21 Q. When did you become aware of that?

22 A. I don't know, several years ago.

23 Q. So sometime shortly after the homicide?

24 A. I'd say about two years ago or so.

25 Q. Okay. And did you also become aware that

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1 the FBI was investigating that homicide as part of
2 alleged activities in furtherance of the SNM Gang?

3 A. I did.

4 Q. And how many times do you think, since the
5 homicide of Mr. Molina, have you met with somebody
6 from the FBI investigating the SNM Gang?

7 A. Maybe once, if that.

8 Q. You have a phone, right?

9 A. I do.

10 Q. And you use that to contact prosecutors?

11 A. I don't believe I've talked to any
12 prosecutors.

13 Q. You didn't talk to any prosecutors today?

14 A. In person, I did.

15 Q. Okay. But let me ask you this: How did
16 you know to come to court today?

17 A. Oh, I was contacted by Mark Myers.

18 Q. And who is Mr. Myers?

19 A. The Chief of Staff for Corrections
20 Department.

21 Q. Okay. And he's in touch with Government
22 prosecutors and investigators?

23 A. I would believe so.

24 Q. Did you ever mention to Mr. Myers this
25 alleged statement that you claimed to have heard from

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1 Mr. Perez?

2 A. I did. And that's when it came up a few
3 days ago.

4 Q. So the first time you mentioned it was a
5 few days ago to Mr. Myers?

6 A. Yes.

7 MS. JACKS: Thank you. I have nothing
8 further.

9 THE COURT: Thank you, Ms. Jacks.

10 All right. Ms. Armijo?

11 REDIRECT EXAMINATION

12 BY MS. ARMIJO:

13 Q. Now, in addition to meeting this morning,
14 is it possible that you met the prosecutors a few
15 months ago when we went out to Southern? And you may
16 not remember.

17 A. And I don't remember. I get a lot of
18 visitors, a lot of people.

19 Q. All right. So talking about this case was
20 the first time that you met with the prosecutors to
21 discuss the case?

22 A. Yes, it is.

23 Q. And by telling -- by requesting a housing
24 officer to take the walker to your office, requesting
25 Ruben Archuleta to take a photograph of it, and

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1 requesting Holguin to interview him, was that what
2 you did to basically further the investigation on the
3 walker and Mr. Perez' involvement?

4 A. That is what I did.

5 Q. Okay. In your duties as Deputy, and
6 Warden, do you go and interview inmates and document
7 it, and take an active part of the investigation, or
8 is that left to people in STIU?

9 A. It's left to STIU.

10 MS. ARMIJO: That's all I have. Thank you.

11 THE COURT: Thank you, Ms. Armijo.

12 All right. Mr. Mulheron, you may step
13 down. Is there any reason Mr. Mulheron cannot be
14 excused from the proceedings, Ms. Armijo?

15 MS. ARMIJO: Your Honor, from this motion,
16 yes. We may call him on other motions that will be
17 next week.

18 THE COURT: All right.

19 MS. ARMIJO: Or possibly, depending on
20 where we are later today.

21 THE COURT: All right. Is there any reason
22 he cannot be excused from this hearing, Mr. Villa?

23 MR. VILLA: No, Your Honor.

24 THE COURT: Any of the defendants?

25 All right. You're excused from this

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1 hearing. Thank you, Mr. Mulheron.

2 All right. Ms. Armijo, does the Government
3 have its next witness or evidence?

4 MS. ARMIJO: We do. It's the person that
5 wrote the memo.

6 And Your Honor, for clarification, we were
7 having another person to come testify, but -- as I
8 indicated as to this, but it will be William
9 Edgman -- but they were stuck up in Santa Fe.

10 THE COURT: I don't know your name yet, but
11 you look like the witness. So if you'll come up and
12 stand next to the witness box on my right, your left,
13 before you're seated, Ms. Standridge, my courtroom
14 deputy will swear you in.

15 WILLIAM EDGMAN,

16 after having been first duly sworn under oath,
17 was questioned and testified as follows:

18 DIRECT EXAMINATION

19 THE CLERK: Please be seated. State your
20 name, spelling your name for the record.

21 THE WITNESS: William Edgman. My last name
22 is E-D-G-M-A-N.

23 THE COURT: I guess I got confused. I
24 thought Mr. Edgman was stuck up in Santa Fe.

25 MS. ARMIJO: Mr. Roarke was.

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1 THE COURT: Mr. Who?

2 MS. ARMIJO: Roarke.

3 THE COURT: All right. Mr. Edgman. Mr.
4 Castellano.

5 MR. CASTELLANO: Thank you, Your Honor.

6 I just want to check. Is the next number,
7 number 30?

8 THE COURT: I think so.

9 BY MR. CASTELLANO:

10 Q. Good morning. Please tell us what you do
11 for a living?

12 A. I am the Deputy Warden at Southern New
13 Mexico Corrections Facility.

14 Q. How long have you worked for the
15 Corrections Department?

16 A. I just started my 20th year this year.

17 Q. And back in 2014, what was your position?

18 A. I was the Major, Chief of Security.

19 Q. I'm going to show you what's been marked
20 for identification as Government's Exhibit 30. While
21 I'm doing that, tell us what your responsibilities
22 were as the Major back in 2014.

23 A. I had several duties as the Major. The
24 primary duties -- I'm the overall highest ranking
25 security officer out there at the facility.

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1 Supervise day-to-day operations from what the shift
2 supervisor is doing, what the officers are doing;
3 doing security audits, making sure that the officers
4 are following proper policies, following the post
5 orders, again, while doing the security audits,
6 ensuring the infrastructure of the facility is well
7 maintained.

8 Q. Did you know that you were testifying this
9 morning?

10 A. I did not.

11 Q. When did you find out you were testifying?

12 A. About 30 minutes ago.

13 MR. CASTELLANO: May I approach the
14 witness, Your Honor?

15 THE COURT: You may.

16 Q. Handing you what's been marked for
17 identification as Government's Exhibit 30. Do you
18 recognize that document?

19 A. I do.

20 Q. Tell us what it is.

21 A. It's a review of the camera system, and
22 it's listing all the discrepancies in the cameras for
23 March 10, 2014.

24 Q. Do you know who prepared that document?

25 A. I did.

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1 Q. When did you prepare the document?

2 A. March 10, 2014.

3 Q. And does it accurately reflect your
4 findings from a review of the camera system at that
5 time?

6 A. Yes, it does.

7 MR. CASTELLANO: Your Honor, I move the
8 admission of Government's Exhibit 30.

9 THE COURT: Any objection, Mr. Villa? Ms.
10 Fox-Young?

11 MS. FOX-YOUNG: No objection, Your Honor.

12 THE COURT: Any other defendants? Not
13 hearing any, Government's Exhibit 30 will be admitted
14 into evidence.

15 Q. Now, you noted the date was March 10 of
16 2014. Do you recall why you prepared this document
17 on that date?

18 A. For that date I was told to get a list of
19 all the cameras that were not operational.

20 Q. Why was that?

21 A. Due to having a homicide at the facility.
22 We had been working towards upgrading our camera
23 system, and this was going to help us upgrade our
24 camera system, identifying the numerous cameras that
25 were out.

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1 Q. So going down the list here, there is an
2 indication that says, "the following cameras are
3 nonoperational"?

4 A. Correct.

5 Q. Can you explain that to us?

6 A. The following cameras are nonoperational,
7 meaning I didn't have any video, or there was an
8 issue with some of those cameras.

9 Q. In terms of where the murder occurred on
10 March 7, 2014, did you take any notes about any of
11 the cameras in that pod?

12 A. Camera 106, which is 1 A B pod right
13 camera, says "poor quality."

14 Q. I indicated there on the exhibit an arrow
15 near 106. And can you, for the Court, explain what
16 you mean -- first of all, when it says 1 A B right,
17 what does that tell us?

18 A. It is the right camera in the pod. There
19 are three cameras in the pod: Left, center, and
20 right.

21 Q. And what did you learn or discover when you
22 reviewed the cameras in that pod?

23 A. That that right camera had poor quality.

24 By noting that it had poor quality, it was either out
25 of focus or the reticle in the camera was out,

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1 showing a bright spot. So the video itself, you
2 couldn't identify anything or be able to make
3 anything out on the video, but the camera itself was
4 not out.

5 Q. So by process of elimination, if the -- if
6 you only had a notation as to the right camera, did
7 that tell you that the left and center cameras
8 appeared to be functioning as they should have?

9 A. Yes.

10 Q. And were you familiar with the system at
11 that time, in terms of video retention and how long,
12 for example, the system would retain a video?

13 A. The retention of video at that time -- I'm
14 not familiar with each DVR. The only thing I can say
15 is when it was initially set up what the retention
16 policy was supposed to be.

17 Q. Well, as time passed, tell us about trends
18 you noticed in the video system, in terms of how much
19 it would retain or not retain, things of that nature.

20 A. Depending on some DVRs. Some DVRs we were
21 lucky to get seven days of retention. Other DVRs, we
22 might get 30 days of retention.

23 Q. And how often -- well, did you do this in
24 response to the homicide that occurred at the
25 facility?

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1 A. Yes.

2 Q. And did you do this at other times?

3 A. Yes.

4 Q. What was the purpose of doing it on the
5 other occasions?

6 A. As one of my jobs as the Chief of Security
7 at the time is, again, to look for failures in our
8 infrastructure, our security processes, which is a
9 camera is part of infrastructure and security. So
10 I'd note discrepancies in the camera system in order
11 to get the contractor out to conduct the proper
12 repairs.

13 THE COURT: Mr. Castellano, would this be a
14 good time for us to take our morning break?

15 MR. CASTELLANO: Yes, Your Honor.

16 THE COURT: All right. We'll be in recess
17 for about 15 minutes.

18 (The Court stood in recess.)

19 THE COURT: Let's try to go back on the
20 record. All right. Let's settle down. I think --
21 look around, I think every defendant has counsel.
22 Make sure your co-defendants are all represented
23 here.

24 All right. Mr. Edgman, I'll remind you
25 that you're still under oath.

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1 Mr. Castellano, if you wish to continue
2 your direct examination of Mr. Edgman, you may do so.

3 MR. CASTELLANO: Yes, sir. Thank you.

4 THE COURT: Mr. Castellano.

5 BY MR. CASTELLANO:

6 Q. Okay. I'm showing you what's been admitted
7 as Rudy Perez Exhibit F. And when we were talking
8 about your testimony this morning I had you draw a
9 diagram. But if we can make this work, I'll use this
10 instead. If you can, first, can you tell us -- and
11 when you touch your screen, you'll be able to
12 basically draw on the screen. So if you can just
13 touch the places where you recall where the pods are,
14 where the cameras are in the pod?

15 A. Okay. So there are three cameras in each
16 pod. So you have -- is that coming out? So where
17 that arrow is would be your right camera. Close to
18 this corner here would be the center camera. And
19 then right above the pod door would be the left
20 camera.

21 Q. Okay. So you have three cameras in the
22 pod. And if you can, can you tell us how the cameras
23 work in terms of capturing what is inside the pod?
24 Does it capture sectors or certain segments of the
25 pod?

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1 A. Correct. Each camera will capture a
2 certain sector of the pod.

3 Q. To the best of your ability, can you draw
4 lines showing what might be captured by each camera
5 angle, or which sector?

6 A. So the left camera would capture
7 approximately the left of the pod. The right camera
8 would capture the right portion of the pod. And the
9 center camera would overlap those sectors.

10 Q. Okay. So for the record, you've drawn some
11 lines on the exhibit from the area labeled "Main
12 Entrance," and you've drawn four lines showing
13 various segments of the pod. Is that accurate?

14 A. Correct.

15 Q. And do you recall in which pod the Molina
16 murder or assault started?

17 A. In which pod?

18 Q. I'm sorry, in approximately which portion
19 of this diagram, or which cell?

20 A. Cell 105, which is on the top tier. But it
21 corresponds with 113, which is on the bottom.

22 Q. So, in other words, is this diagram a
23 diagram of the lower section of the pod?

24 A. Correct.

25 Q. And then there is an upper section. And

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1 you've got corresponding numbers for top and bottom?

2 A. Correct.

3 Q. And do you recall where Rudy Perez' room
4 was?

5 A. I believe he was 115.

6 Q. So I've drawn a circle around 115 there.

7 So when you mentioned that the right camera was
8 having difficulty, or was of poor quality, was that
9 the area where Rudy Perez' cell was?

10 A. Yes.

11 MR. CASTELLANO: I pass the witness, Your
12 Honor.

13 THE COURT: Thank you, Mr. Castellano.

14 Let me go ahead and have Ms. Fox-Young
15 cross-examine Mr. Edgman.

16 Ms. Fox-Young.

17 MS. FOX-YOUNG: Thank you, Your Honor.

18 EXAMINATION

19 BY MS. FOX-YOUNG:

20 Q. Good morning, sir.

21 A. Good morning.

22 Q. I didn't catch your current rank. Did you
23 say you're currently the Deputy Warden at Southern?

24 A. Correct.

25 Q. And so your title is Deputy Warden?

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1 A. Yes, ma'am.

2 Q. All right. Deputy Warden, you said that in
3 2014, you were the Major and the Chief of Security
4 for the facility; is that right?

5 A. Correct.

6 Q. And one of your duties in that job capacity
7 was to make sure that the proper policies were
8 followed at Southern; is that right?

9 A. Correct.

10 Q. And that included policies on evidence
11 collection?

12 A. Correct.

13 Q. I think you said that. Correct me if I am
14 mischaracterizing your testimony.

15 A. No, that's what I said.

16 Q. Okay. And did that include chain of
17 custody for evidence collection?

18 A. That's part of our policies, yes, ma'am.

19 Q. Can you tell me what the policy on chain of
20 custody for evidence collection was in March 2014?

21 A. As far as?

22 Q. What's the proper protocol to follow in
23 March 2014, if you're collecting evidence at the
24 facility?

25 A. With the chain of custody, if you collect

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1 things on the chain of custody, date and time you
2 collected it, and the disposition of that evidence
3 after you collected it, whether it went to the
4 evidence locker, you turned it over to somebody else.

5 Q. And the facility has chain of custody forms
6 to use for that purpose?

7 A. Yes, ma'am.

8 Q. In conformity with the New Mexico
9 Corrections Department policy on evidence collection?

10 A. Yes, ma'am.

11 Q. Do you have -- in March 2014, were there
12 labels that were to be affixed to evidence collected
13 to make that process easier?

14 A. No, ma'am.

15 Q. When evidence was collected at that time --
16 and if it's the same today, you can tell me that --
17 how was somebody supposed to document that they
18 actually collected evidence on a certain date and
19 time, and the disposition, where was that recorded?

20 A. On the evidence envelope.

21 Q. The evidence envelope?

22 A. Yes, ma'am.

23 Q. So all evidence was to be in an envelope as
24 well?

25 A. If it would fit in an evidence envelope, it

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1 would go into a evidence envelope. I can't say all
2 evidence would go into an evidence envelope.

3 Q. Some evidence is too big to fit in an
4 envelope. And when evidence is too big to fit in an
5 envelope, what is the proper protocol for collecting
6 it and maintaining chain of custody?

7 A. You would affix that evidence envelope to
8 the item, because the evidence envelope itself has
9 the chain of custody with a description of the
10 evidence.

11 Q. So the envelope itself, with the
12 information, date and time collection, and
13 disposition would be attached to the piece of
14 evidence?

15 A. Right.

16 Q. And that was under you, as Chief of
17 Security in March of 2014, that was proper protocol?

18 A. Yes, ma'am.

19 Q. Where was any evidence collected at the
20 facility to be held?

21 A. In our evidence locker.

22 Q. Where is that located?

23 A. Master control.

24 Q. Is that evidence -- how big is that
25 evidence locker?

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1 A. Maybe a 2 by 4 by 4.

2 Q. Two feet by four feet?

3 A. Two feet deep, four feet wide, four feet
4 high.

5 Q. Is it still there?

6 A. Yes, ma'am.

7 Q. If an outside entity is investigating a
8 case, some other law enforcement agency, do they take
9 custody of that evidence, or does it remain at the
10 facility?

11 A. They take custody of it.

12 Q. At what point do they take custody?

13 A. When they collect it.

14 Q. When who collects it?

15 A. The outside agency. If the outside agency
16 is conducting the investigation, then they're the
17 ones collecting the evidence.

18 Q. Okay. And in this case, the Javier Molina
19 homicide, who was conducting the investigation?

20 A. From my understanding, it was State Police.

21 Q. And so did State Police collect the
22 evidence in this case?

23 A. One would assume they did.

24 Q. Do you know for certain?

25 A. No, ma'am.

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1 Q. Okay. Did you have anything to do with
2 collection of evidence related to the Javier Molina
3 homicide?

4 A. No, ma'am.

5 Q. Did you ever review any evidence related to
6 the homicide?

7 A. No, ma'am.

8 Q. To this date, have you reviewed any
9 evidence related to the homicide?

10 A. No, ma'am.

11 Q. Did the prosecution?

12 MR. JEWKES: Your Honor, could we ask the
13 witness to speak up?

14 A. How's that?

15 Q. I can hear you fine, Deputy Warden.
16 Everybody?

17 So to this day, you haven't reviewed any
18 evidence related to the Molina homicide?

19 A. No, ma'am.

20 Q. And you didn't participate in collecting
21 any?

22 A. No, ma'am.

23 Q. When did the prosecution contact you
24 regarding your testimony today?

25 A. At about 9:30 this morning.

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1 Q. Okay. Who contacted you?

2 A. As a matter of fact, it was my Warden that
3 called me and said, "Come on down."

4 Q. Who is that?

5 A. James Mulheron.

6 Q. He said, Come on down to court to testify?

7 A. He said, "Come on down, they want to talk
8 to you."

9 Q. Okay. And you arrived here and you talked
10 to the Government?

11 A. Yes, ma'am.

12 Q. Who did you talk to?

13 A. I forgot his name, but the gentleman with
14 the goatee right behind you.

15 Q. And did you bring any documents with you?

16 A. I did not.

17 Q. Did you have any documents related -- as
18 far as you know, related to the Molina case?

19 A. I do not.

20 Q. No emails?

21 A. No, ma'am.

22 Q. No memos?

23 A. No, ma'am.

24 Q. Did you ever receive any emails or memos
25 that you recall related to the Molina case?

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1 A. No, ma'am.

2 Q. Have you ever talked to Rudy Perez?

3 A. When I do my rounds.

4 Q. Okay. Are you aware that Rudy Perez, at
5 one point when he was housed at Southern, had a
6 walker in his possession?

7 A. Afterwards, I heard about that. At the
8 time, I really wasn't familiar with Mr. Perez nor did
9 I even realize he had a walker with him in his cell.

10 Q. Did you customarily -- you said when you
11 did your rounds, you would see Mr. Perez?

12 A. Yes, ma'am.

13 Q. Did you customarily do rounds in blue pod
14 in March of 2014?

15 A. In March of 2014, yes.

16 Q. Every day?

17 A. No.

18 Q. When did you do rounds?

19 A. Usually, around once a week.

20 Q. And that was in your capacity as Chief of
21 Security?

22 A. Correct.

23 Q. Did you do rounds in every pod once a week?

24 A. Yes, ma'am.

25 Q. Did you ever see Mr. Perez' walker?

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1 A. Not that I recall.

2 Q. Have you ever seen a walker that somebody
3 claims belonged to Mr. Perez since?

4 A. No, ma'am.

5 Q. Now, you testified that you think after the
6 fact -- I think you mean after the homicide -- you
7 heard something about a walker?

8 A. Yes.

9 Q. What did you hear?

10 A. That Mr. Perez had a walker, and it was
11 confiscated from him.

12 Q. Who told you that?

13 A. I don't recall.

14 Q. Was this close in time to the murder?

15 A. Yes, a short period after. I don't know
16 exactly how many days or whatnot, but maybe a couple
17 of weeks afterwards.

18 Q. You think it was a couple of weeks later?

19 A. That's what I -- from my recollection, yes,
20 ma'am.

21 Q. Okay. But you don't have any notes or
22 reports or other documentation that tells you that?
23 That's just your memory?

24 A. Correct.

25 Q. Do you remember who told you that Rudy

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1 Perez had a walker?

2 A. No, ma'am.

3 Q. Do you remember if it was somebody in STIU?

4 A. I don't remember.

5 Q. Did you attend any briefings pertaining to
6 the Molina homicide?

7 A. We had debriefings pertaining to the
8 homicide, yes, ma'am.

9 Q. Who conducted those debriefings?

10 A. At the time it would be the Warden. We'd
11 have STIU in there. The Warden, STIU.

12 Q. Okay. Can you educate me, just because I'm
13 not entirely familiar with your organizational
14 structure. Was STIU underneath you? Currently, are
15 they underneath you in the facility as Chief of
16 Security? Were you supervising STIU officers?

17 A. No, ma'am.

18 Q. Who was supervising them?

19 A. They had a deputy director, an STIU manager
20 up in Central Office. They didn't fall under the
21 facilities.

22 Q. Who was that person?

23 A. I don't recall who it was at that time.

24 Q. In Southern, was that person Captain
25 Blanco?

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1 A. He would be the STIU Coordinator for the
2 facility, correct.

3 Q. But he answered to somebody at Central?

4 A. At Central Office.

5 Q. You mean PNM?

6 A. Central office, Santa Fe; deputy directors,
7 director, yes, ma'am.

8 Q. Okay. But in March of 2014, you were not
9 part of STIU at all?

10 A. No, ma'am.

11 Q. Have you reviewed the video that the
12 prosecutor was asking you about that was produced by
13 the cameras in the blue pod?

14 A. I've seen the video.

15 Q. Okay. Sir, I'm showing you what's been
16 marked as Rudy Perez Exhibit N. And this is an
17 exhibit that has been admitted. I'll represent to
18 you that it's a photograph that was taken in blue
19 pod. Do you recognize it as that?

20 A. Yes, ma'am.

21 Q. And the Government asked you some questions
22 about the three cameras in blue pod, right?

23 A. Yes.

24 Q. Do you see them pictured here?

25 A. I do.

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1 Q. Is this camera that I'm pointing to one
2 that was working on March 7, 2014?

3 A. Yes.

4 Q. And this camera?

5 A. Yes.

6 Q. And this camera?

7 A. That's the camera with poor picture
8 quality.

9 Q. Okay. So it was working, but you say it
10 had poor picture quality?

11 A. Yes, ma'am.

12 MS. JACKS: For the record, what camera is
13 that?

14 MS. FOX-YOUNG: For the record, this is the
15 camera on the far left of Rudy Perez Exhibit N. The
16 upper left.

17 Q. Is that right, sir, this camera?

18 A. Looking at it from this perspective, yes,
19 it's on the left. If you're in the pod, that would
20 be the right camera.

21 Q. That visualized the -- facing the cells and
22 the pod, the far right side?

23 A. Yes, ma'am.

24 Q. And I think you testified that you
25 conducted a review or an inspection of all the

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1 cameras at Southern in the days following the Molina
2 homicide?

3 A. Yes, ma'am.

4 Q. When did you start that review?

5 A. March 10th.

6 Q. And I apologize if you've already testified
7 to this, but who asked you to do the review?

8 A. The Warden.

9 Q. And so you went in and physically inspected
10 each camera?

11 A. I did not physically inspect each camera.

12 Q. How did you do your review?

13 A. There is a monitor at master control, which
14 we have the capability of reviewing every camera in
15 the facility. So what I did is I scrolled through
16 every camera in the facility, to see if we were
17 getting video feed from those cameras.

18 Q. And is that -- were you sitting in the STIU
19 office when you did that?

20 A. No.

21 Q. Master control.

22 A. Master control.

23 Q. Okay. And you produced this memo on March
24 10, 2014?

25 A. Yes, ma'am.

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1 Q. I see that for several cameras -- three of
2 the cameras you indicate poor quality; is that right?
3

4 A. Yes, ma'am.
5

6 Q. Now, where you didn't indicate poor
7 quality, were you representing to the warden that the
8 camera was totally nonfunctional?
9

10 A. Correct, no video feed at all.
11

12 Q. None at all. And was there any way for you
13 to tell when you did that review how long that had
14 been the case?
15

16 A. For that would I have to go back to my last
17 review of the cameras.
18

19 Q. Do you know when your last review was?
20

21 A. Probably six months prior to that. And
22 that would be a guess.
23

24 Q. So probably around the fall of 2013?
25

26 A. Possibly.
27

28 Q. So what this memo then says is that on
29 March 10, 2014, this is the state of these cameras?
30

31 A. Correct.
32

33 Q. But you don't know the state of the cameras
34 on March 9?
35

36 A. No, ma'am.
37

38 Q. Okay. Or any other day?
39

40 A. My guess would be similar to this, but no,
41

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1 not unless I did a review of the cameras each and
2 every day and say: This date, this is how the state
3 of our cameras were this date, and this date. But,
4 no.

5 Q. Okay. Now, could you have actually -- I
6 can't remember if you explained how far back in time
7 you could go. If you wanted to pull a specific feed
8 in doing that review, could you look back three
9 weeks?

10 A. It would depend on how the state of the
11 DVR.

12 Q. Okay. But you didn't do it?

13 A. No, ma'am.

14 Q. I understand that you did periodic reviews
15 to see if the cameras were working, maybe every six
16 months?

17 A. Correct.

18 Q. Or upon request of the Warden?

19 A. Correct.

20 Q. If a camera wasn't working, would master
21 control report that to you?

22 A. Master control doesn't have a view of every
23 camera at any given time.

24 Q. Does anybody?

25 A. No. You have to scroll through the

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1 cameras.

2 Q. So is there anybody at the facility, in
3 March of 2014, who would report a faulty camera?

4 A. Again, if master control was scrolling
5 through a camera and they found out a certain camera
6 wasn't operational, they would report to the shift
7 supervisor. We did have electronics technician whose
8 job at the time was to -- the upkeep of the system as
9 far as he could upkeep it. So there is a reporting
10 mechanism in place, yes, ma'am.

11 Q. Okay. And those reports would make their
12 way to you?

13 A. Not all the time, no, ma'am.

14 Q. Sometimes they would just go to the
15 technician?

16 A. Yes, ma'am.

17 Q. In the course of your review, on March 10,
18 2014, did you look to see if there were any reports
19 of faulty cameras?

20 A. Not on that day, no.

21 Q. Okay. So you didn't look to see whether
22 anybody had made a report that a camera wasn't
23 working? You just looked to see if they were working
24 on that day?

25 A. Correct.

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1 Q. Okay. The cameras that appear on
2 Government's Exhibit 30, numbered 50 and 51, labeled
3 Education Exterior PTZ, and Education Interior PTZ,
4 are those of the education building?

5 A. Yes, ma'am.

6 Q. Are there any other cameras that are
7 located at the education building, either inside or
8 outside?

9 A. Today or back then?

10 Q. Back then. Thank you.

11 A. I believe so. I couldn't tell you a
12 hundred percent.

13 Q. Do you know what cameras 50 and 51 face,
14 what they look at and record?

15 A. I do not. That's the title of those
16 cameras, Education Exterior, PTZ. If I were to guess
17 on it, would be the PTZ on the outside of education,
18 facing our E gate, which is our gate going on to the
19 compound.

20 Q. Is that where inmates enter the education
21 building?

22 A. No, ma'am.

23 Q. Is it where they exit?

24 A. No, ma'am.

25 Q. So would either of these cameras capture

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1 anybody leaving that building?

2 A. Probably the interior PTZ, depending on
3 where it was facing, because it's a PTZ.

4 Q. Okay. I know you said you conducted this
5 review to see if they were working. Did you actually
6 look at the feeds from any of these cameras for
7 purposes of determining what might have happened in
8 the days prior to March 10, 2014?

9 A. No, ma'am.

10 Q. Did anybody ask you to?

11 A. No, ma'am.

12 Q. Do you know what building the wheelchair
13 program is located in?

14 A. Yes, ma'am.

15 Q. What building is that?

16 A. Education building.

17 Q. Do you know if camera 50 or 51 captures any
18 portion of the wheelchair program, the entry to it?

19 A. 50 would not. But 50 is exterior PTZ; 51,
20 I would say would not, because if I were to look at
21 it, the interior PTZ would probably be at the
22 innermost part of education, as you first walk in.
23 The wheelchair program is at the back of education.

24 Q. Is there a camera -- was there a camera, in
25 March of 2014, that did capture any portion of the

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1 wheelchair program?

2 A. Not that I'm aware of.

3 Q. Were there cameras inside the wheelchair
4 program?

5 A. At that point in time, not that I'm aware
6 of.

7 Q. And you just don't think there was a camera
8 angle that captured the door?

9 A. Correct.

10 Q. Is there any way you could find out?

11 A. Possibly.

12 Q. I mean, is there a document that exists
13 that details what camera -- where the cameras were in
14 March of 2014, and what they captured?

15 A. No, ma'am, not that I'm aware of.

16 Q. Only your memory?

17 A. Sure.

18 Q. Okay. Have you been -- you were asked by
19 the Warden to do this review of the surveillance
20 system. Were you asked to do anything else by the
21 Warden around this time related to -- well, were you
22 asked to do anything else related to the Molina
23 homicide?

24 A. No, ma'am.

25 Q. Did the Warden ask you in person to do

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1 this?

2 A. I'd say most likely, yes, ma'am.

3 Q. Okay. How did you find this document?

4 A. The one that's in your hand, it was
5 presented to me by the attorney this morning.

6 Q. Did they present you with any other
7 documents?

8 A. No, ma'am.

9 Q. You said that the camera had poor quality
10 on the right side?

11 A. Yes, ma'am.

12 Q. When is the last time that you reviewed the
13 camera -- the footage from the Molina homicide?

14 A. 2014.

15 Q. Not since?

16 A. No.

17 Q. Okay. So do you have any recollection of
18 whether the footage captured all of the cells in blue
19 pod, whether there was an actual image of the cells
20 on March 10th?

21 A. The left camera would pick up some of the
22 cells in its sector. The center camera would pick up
23 its sector. And the right camera -- again, if I put
24 down poor quality, it's because you couldn't make out
25 anything in the pod, but still sending video feed.

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1 Q. Just so I understand, this assessment that
2 you made on March 10th was based upon what you saw on
3 March 10th?

4 A. Yes.

5 Q. But you also -- correct me if I'm wrong --
6 reviewed the video that was captured on March 7?

7 A. Yes.

8 Q. And when did you review that?

9 A. Probably the next day after the homicide.

10 Q. Did you -- were you by yourself?

11 A. No.

12 Q. Who did you review it with?

13 A. Probably there with me, the Wardens, the
14 Deputy Wardens. I couldn't tell you exactly who I
15 was with. I don't remember everybody that was there.

16 Q. Do you remember how the camera quality was
17 on that tape? I don't know if it was a tape or you
18 were watching it live?

19 A. No, we weren't watching it live.

20 Q. Well, I don't know if you were playing a
21 tape, or if you were pulling it from the system. Do
22 you know?

23 A. It was probably a CD.

24 Q. A CD. Okay. Do you remember one way or
25 another whether the quality was poor?

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1 A. On the video that we saw, the quality was
2 pretty good.

3 Q. Okay. And was that for all of the cameras?

4 A. No.

5 Q. Tell me which cameras did not have good
6 quality?

7 A. I can't tell you because we didn't have a
8 video of a bad quality camera. The video had two
9 cameras in it, the left and the center. There are
10 three cameras in the pod. The right camera, there
11 was no recording.

12 Q. Okay. But the two cameras that we talked
13 about; the one in the middle --

14 A. That's the center.

15 Q. -- of Defendant's Exhibit N.

16 A. Yes.

17 Q. And the one on the --

18 A. Left; that is the left camera.

19 Q. The left camera, you think were working and
20 did not have poor quality?

21 A. Correct.

22 Q. And were those cameras able to capture all
23 of the cells in the pod, from your recollection from
24 2014?

25 A. All the cells in the pod? No, ma'am.

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1 Those two cameras would not capture all the cells in
2 the pod.

3 Q. Which cells were not captured on the feed
4 that you watched in March of 2014?

5 A. I couldn't tell you exactly off of that
6 video. But off of my experience, I could tell you
7 which cells would have been captured based off those
8 two cameras locations.

9 Q. Do you remember any cells not being
10 captured when you watched that video?

11 A. No.

12 MS. FOX-YOUNG: Your Honor, just a moment.

13 THE COURT: Certainly.

14 Q. Sir, are you familiar with the New Mexico
15 Corrections Department policy regarding cameras that
16 existed in March of 2014?

17 A. I'm not familiar with it, no.

18 Q. Was it your job as Chief of Security to
19 make sure that all of the policies in effect at the
20 institution were abided by?

21 A. Security policies, yes, ma'am.

22 Q. Okay. And you said evidence collection
23 policies?

24 A. Yes.

25 Q. Have you ever seen -- I'll show you -- this

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1 is Rudy Perez' Exhibit KK. Do you remember -- are
2 you familiar with this policy number 130700 governing
3 cameras?

4 A. I'm sure I've seen it before.

5 Q. And I'll represent to you that this -- you
6 can see the date on it. This was last revised in
7 February 2012. It was in effect in the early part of
8 2014. And you'll see there is some portions of this
9 policy that pertain to the stationary cameras at the
10 facility. Are you familiar with that?

11 A. I see it.

12 Q. Okay. And in March of 2014, it was
13 required, was it not, by the department that the
14 Chief of Security or designee will review all
15 stationery cameras and PTZ cameras weekly; is that
16 right?

17 A. That's what it says there, yes, ma'am.

18 Q. Okay. And so, in March of 2014, were you
19 then required to review all those cameras weekly
20 according to this policy?

21 A. According to the policy, yes, ma'am.

22 Q. Okay. And in practice, sounds like it
23 didn't always happen?

24 A. No, ma'am.

25 Q. And the policy also requires the Chief of

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1 Security to document those inspections, and forward
2 them to the Warden's office for review, right?

3 A. Yes, ma'am.

4 Q. Do you know if you ever documented -- I
5 know we have this document that was presented to you
6 by the prosecution. Are there other documents where
7 you forwarded to the Warden, a document detailing
8 your inspections?

9 A. Yes, ma'am.

10 Q. Okay. Did you do that every time you did
11 an inspection?

12 A. Yes, ma'am.

13 Q. Do those still exist?

14 A. I do not know.

15 Q. You send them to the Warden?

16 A. We gave them to the Warden.

17 Q. Would you email them, or hand them to the
18 Warden?

19 A. I'd write it out in a hard copy and hand it
20 to him.

21 Q. Are you familiar with the locations of all
22 the cameras at the facility in your current capacity?

23 A. As the cameras are at right now?

24 Q. Yes.

25 A. Not every single one of them, because we

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1 just had a new camera system put in.

2 Q. When was that?

3 A. That got completed two months ago.

4 Q. Okay. Prior to the installation of the new
5 system, are you familiar with the locations of all
6 the cameras?

7 A. Not of every single camera, no.

8 Q. You described where the cameras were
9 located in the education building to me; is that
10 right?

11 A. I didn't describe where all the cameras
12 were located in the education building. I described
13 where 50 and 51 were located.

14 Q. I'm showing you an image. Do you recognize
15 this image? Do you know where this is at Southern?

16 A. Yes.

17 Q. And you're familiar with which portion of
18 which building that's in?

19 A. Yes.

20 Q. Can you tell me which one?

21 A. Okay. So that door that you see open, if
22 you went through that door, you would be going up the
23 hallway to the entrance and exit of the actual
24 education building. Coming down the hallway, that's
25 a portion that we call the horseshoe. So if you came

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1 down the hallway, you would make a right, and that
2 would get you to the doorway to get to the wheelchair
3 program.

4 Q. Okay. It's a little hard to see. But on
5 your description this open door, is that to the
6 wheelchair program?

7 A. No, ma'am.

8 Q. Where is -- is that around to the left? Do
9 you have to turn left at the end of this hallway to
10 get to the wheelchair program?

11 A. You come down the hallway, and you have to
12 turn right.

13 Q. And go through that door?

14 A. No.

15 Q. Can you show me on your screen where the
16 wheelchair program is related in relation to this --

17 A. Okay.

18 Q. -- hallway?

19 A. You'd have to come through the door, come
20 down the hallway, and then you're going to veer right
21 at the end of this hallway.

22 Q. Okay. And do you see any cameras depicted
23 in this image?

24 A. No.

25 Q. Do you see these devices in the upper right

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1 corner of the screen?

2 A. I see that there.

3 Q. And also this one?

4 A. To my knowledge, that's a smoke detector.

5 Q. Okay. Is this a camera that you circled,
6 do you know?

7 A. Based off the image, I couldn't be one
8 hundred percent sure, but I'd say it's a camera.

9 Q. Okay. Do you know if there is a camera in
10 that location?

11 A. Right now?

12 Q. Yes.

13 A. Right now, I'd say yes, there is a camera
14 in that location.

15 Q. Do you know if there was a camera in that
16 location in March of 2014?

17 A. Looking at this picture, that looks like
18 our old camera system. So if there is a picture of
19 it there, when this picture was taken, I'd say yes,
20 there was.

21 Q. Okay. Would this camera, or does this
22 camera capture any portion of the wheelchair program,
23 if you know?

24 A. It would not.

25 Q. It does not. And do you know if there was

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1 another camera that was in place in March of 2014
2 that did?

3 A. I do not.

4 Q. You don't know?

5 A. No.

6 MS. FOX-YOUNG: No further questions, Your
7 Honor.

8 THE COURT: All right. Thank you, Ms.
9 Fox-Young.

10 Any other defendants have questions for
11 Mr. Edgman?

12 MS. JACKS: Your Honor, I do.

13 THE COURT: Ms. Jacks.

14 EXAMINATION

15 BY MS. JACKS:

16 Q. Good morning, Mr. Edgman.

17 A. Good morning.

18 Q. I just want to clear up some questions that
19 I have about this memo. So I'm holding what's
20 Government's Exhibit 30, which is a memo that you
21 prepared on March 10, 2014?

22 A. Yes, ma'am.

23 Q. And you reviewed that today before
24 testifying?

25 A. Yes, ma'am.

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1 Q. But the memo was provided to you by the
2 Government?

3 A. Yes, ma'am.

4 Q. You didn't bring it with you?

5 A. No, ma'am.

6 Q. Okay. And I'm looking at it. Let's see,
7 if I'm just looking at the top -- I need to make this
8 smaller. So you prepared this memo to the Warden to
9 document which cameras were working, partially
10 working, or nonfunctional; is that right?

11 A. Yes, ma'am.

12 Q. And the first sentence of this memo says,
13 "The following cameras are nonoperational," and then
14 that is a colon?

15 A. Right.

16 Q. Then there is a three-page list of cameras?

17 A. Correct.

18 Q. So are you meaning to say that every camera
19 listed in this memo is nonoperational?

20 A. Yes, ma'am.

21 Q. Okay. So every camera on the three-page
22 list was either partially working or not working on
23 March 10, 2014?

24 A. Yes, ma'am.

25 Q. Okay. And I want to direct you to cameras

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1 102, 106, and 107. Okay, is that how you designate
2 those cameras?

3 A. That's how they are identified on the
4 camera system, yes, ma'am.

5 Q. Okay. And I want to show you the
6 photograph that's been marked as Rudy Perez Exhibit
7 N, which is a diagram depicting the unit where the
8 Molina homicide occurred. Do you recognize this
9 diagram?

10 A. Yes, ma'am.

11 Q. Okay. So can you tell me, there is a
12 camera over the blue exit door on the far right-hand
13 side of the photograph.

14 A. Correct.

15 Q. Is that camera 102, 106, or 107?

16 A. No.

17 Q. What camera is it?

18 A. I couldn't tell you the number of the
19 camera. I could tell you it would be the left
20 camera.

21 Q. Okay. Well, can we go back to this list?

22 A. Sure.

23 Q. That's where I'm having trouble.

24 Which camera is the left -- I see another
25 way to designate the cameras, 1 A A, 1 A B, and 1 A

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1 C?

2 A. 1 A A is housing unit 1 A, A pod. 1 A B is
3 B pod, 1 A C is C pod. Three different pods.

4 Q. All right. So the cameras in the exhibit I
5 just showed you, RP-N, can you tell me what cameras
6 they are?

7 A. Sure. If you can put up the picture, I can
8 tell you.

9 Q. Let's start with the one on the far right
10 over the blue exit door, the blue door with the exit
11 sign?

12 A. That would be the right camera. This is
13 the center camera for the pod. And that would be the
14 left, or the right camera. So left, center, and
15 right.

16 Q. So the camera over the blue exit door is
17 the left camera?

18 A. Yes, ma'am.

19 Q. Center is obvious. And the other camera is
20 the right?

21 A. Correct.

22 Q. Okay. On this list of cameras in the memo
23 that you prepared on March 10th, can you tell me
24 where those cameras -- if they're located on the
25 list, where they were on the list?

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1 A. So 1 A B right is poor quality. So the
2 right camera in B pod.

3 Q. So that is this one right here, number 106,
4 1 A B, right?

5 A. Correct.

6 Q. And that's the camera that's poor quality?

7 A. Correct.

8 Q. So it was functioning on March 10, 2014,
9 but it wasn't functioning well?

10 A. Correct.

11 Q. The images were fuzzy?

12 A. I'm not one hundred percent certain if the
13 images were fuzzy, or if the reticle inside the
14 camera itself was showing a bright picture.

15 Q. Okay.

16 A. Poor quality; you couldn't make anything
17 out. But as to whether it was a blurred picture, or
18 a bright picture due to the reticle in it; that, I
19 don't remember.

20 Q. Okay. But the camera wasn't broken; it was
21 running, it was functioning?

22 A. It was sending video feed, yes, ma'am.

23 Q. It just wasn't functioning at top quality?

24 A. Correct.

25 Q. And that would be the camera -- just so we

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1 are all clear, I'm showing you Rudy Perez N. That
2 would be the camera that's --

3 A. The right camera.

4 Q. The camera that's not over the blue exit
5 door?

6 A. Correct.

7 Q. Okay. So that one was, on March 10th,
8 filming, but filming poor quality, camera 106?

9 A. Correct.

10 Q. Okay. Let's talk about the camera over the
11 blue exit door, the camera that you call the left
12 camera.

13 A. Correct.

14 Q. Which camera is that on this Exhibit 30?

15 A. It's not on that list, because it was
16 operational.

17 Q. That camera was working?

18 A. Yes, ma'am.

19 Q. A hundred percent?

20 A. Yes, ma'am.

21 Q. So not on the list of nonoperational
22 cameras?

23 A. Correct.

24 Q. And what about the center camera; is that
25 on this list?

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1 A. No, ma'am, it's not.

2 Q. So that was working on March 10, 2014?

3 A. Yes, ma'am.

4 Q. Referring to the camera, the 106, the 1 A B
5 right. On March 10, 2014, if you'd been asked to
6 pull video feed from that camera, the poor quality
7 camera, could you have done that?

8 A. I'd imagine so, yes, because it's sending
9 video feed to the DVR.

10 Q. Okay. Now, is the Southern New Mexico
11 Correctional Facility accredited by some sort of
12 agency?

13 A. Back then, or at this point in time?

14 Q. Back then, back in March of 2014.

15 A. I'm not one hundred percent sure, but I'd
16 probably say in 2014 our ACA accreditation had
17 expired.

18 Q. As part of your ACA accreditation, do you
19 have to make reports regarding surveillance cameras
20 in the institution?

21 A. I'm not one hundred percent sure on their
22 standards for video surveillance.

23 Q. If a camera is broken -- and I mean by
24 broken, not sending video feed -- do you have some
25 sort of duty, either under the ACA standards or New

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1 Mexico Department of Corrections standards, to make a
2 report within a certain period of time?

3 A. Not that I'm aware of.

4 Q. This report that you prepared about the
5 following cameras being nonoperational is dated March
6 10, 2014. Do you know the previous report, the one
7 before this, the date on that?

8 A. I do not.

9 Q. Would there be one?

10 A. Yes, ma'am.

11 Q. Do you know how often you prepared reports
12 about the list of nonoperational or partially
13 functioning cameras?

14 A. About every six months.

15 Q. So at the longest you would expect to have
16 a report maybe from October?

17 A. The fall of '13.

18 Q. October, November, 2013?

19 A. Yes, ma'am.

20 Q. And where are these reports kept?

21 A. Where are they kept?

22 Q. Right.

23 A. I don't know what the Warden would do with
24 them after I gave it to her.

25 Q. But you provide the report to the Warden?

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1 A. Correct.

2 Q. And then the Warden maintains custody of
3 it, or does whatever she does with it?

4 A. Correct.

5 Q. And if a camera is not working, what is the
6 reason for that?

7 A. I don't know.

8 Q. Could be anything?

9 A. Could be anything.

10 Q. Could be turned off?

11 A. We can't just turn off the camera.

12 Q. And when a camera is not functioning, is
13 there a specific period of time that you have, or
14 that you're supposed to get the camera fixed?

15 A. Not that I'm aware of.

16 Q. And I want to go back to this list in
17 Government's Exhibit 30. Are there -- first of all,
18 are there cameras in unit 1 A C pod?

19 A. Yes.

20 Q. And were there cameras there in March of
21 2014?

22 A. Yes.

23 Q. How many?

24 A. Three.

25 Q. And would they be the same configuration as

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1 the cameras in B pod?

2 A. Yes.

3 Q. Right, center, and left?

4 A. Correct.

5 Q. And according to this list on March 10,
6 2014, were any of those three cameras not working
7 based on your observations?

8 A. Yes, ma'am.

9 Q. Which one?

10 A. 1 A C right.

11 Q. And is that what you call -- is that on
12 this list, camera 107?

13 A. Yes, ma'am.

14 Q. And in your terminology, right, center, or
15 left, which camera is that?

16 A. Right.

17 Q. The right. What about the other two
18 cameras in unit 1 A C, based on your March 10, 2014
19 review?

20 A. They would be operational.

21 Q. So on March 10, 2014 there were two
22 functioning cameras in unit 1A C?

23 A. Yes, ma'am.

24 MS. JACKS: Thank you. I have nothing
25 further.

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1 THE COURT: Thank you, Ms. Jacks.

2 Did you have something, Mr. Lowry?

3 EXAMINATION

4 BY MR. LOWRY:

5 Q. Good morning.

6 A. Good morning.

7 Q. I just want to get a little clarification.

8 Hope this helps everyone in the room. This is Rudy
9 Perez Exhibit N, and this is a photograph of the blue
10 pod; is that correct?

11 A. Yes, sir.

12 Q. Okay. Above these cameras, this is the
13 guards' observation station, isn't it?

14 A. Yes, that's the officers' station, yes.

15 Q. And as a matter of perspective, that's why
16 the cameras are labeled right, center, and left,
17 because they're labeled from how the guards would
18 observe the pod?

19 A. Correct. Or how you're looking at the pod
20 coming in the door.

21 Q. Correct. And that's the same for each pod?

22 A. Yes, sir.

23 Q. And so the blue pod, as I recall, housing
24 unit 1 A was on one end, then there is blue, yellow,
25 and then green?

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1 A. Yellow, blue, and then green in 1 A.

2 Yellow is A pod.

3 Q. And that's where I'm going with this. If
4 you could explain the layout of how they were laid
5 out.

6 A. How the pods are laid out in the housing
7 unit?

8 Q. Correct.

9 A. So yellow pod was A, blue pod was B, and
10 red pod was C.

11 Q. So that would correspond with what we see
12 on Government's Exhibit 30, with 1 A A right would
13 be --

14 A. The right camera in A pod.

15 Q. And that is green pod?

16 A. A pod is yellow.

17 Q. So A pod is in the center?

18 A. Yes.

19 Q. A pod is yellow. B pod is blue?

20 A. Correct.

21 Q. And then C pod would be the green pod?

22 A. Correct.

23 Q. So in each pod, as you looked at it from
24 the guards' station on top, the camera on the
25 right-hand side of the pod was out?

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1 A. Correct.

2 Q. Now, I just want to be clear on this, and
3 this is Rudy Perez Exhibit F. I believe you
4 described this is a schematic of the lower level of
5 the pod; correct?

6 A. Correct.

7 Q. Okay. And right here, where it says "long
8 walkway" over here, there would be a transit door
9 between the blue pod and the yellow pod; correct?

10 A. Correct.

11 Q. And the camera that was out in this pod
12 would have captured that door; correct?

13 A. Correct.

14 Q. But the same guard station, the camera on
15 the other side of that door in yellow pod was
16 functioning on March 7, 2014, wasn't it?

17 A. It should have been.

18 Q. According to Government's Exhibit 30, it
19 was, wasn't it?

20 A. That's dated March 10th.

21 Q. Okay. On March 10, 2014, was this camera
22 functioning?

23 A. Yes.

24 Q. Do you have any reason to believe it was
25 not functioning on March 7?

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1 A. No, I don't.

2 Q. In fact, Ms. Jacks had discussed a little
3 earlier about your policy to report nonfunctioning
4 cameras, and I believe you said you weren't aware of
5 the policy?

6 A. Correct.

7 Q. Okay. But if we look at the Department of
8 Corrections policy, which is marked Rudy Perez
9 Exhibit KK -- and this is New Mexico Corrections
10 Department policy 130700, at page 3 -- any
11 nonfunctioning camera should have been reported to
12 the Warden within 48 hours; isn't that right?

13 A. That's what it says.

14 Q. Well, that was the policy of the
15 Corrections Department, wasn't it?

16 A. Yes.

17 Q. And that policy wasn't followed by the
18 staff at Southern, was it?

19 A. No.

20 Q. So would there be any -- and the reason --
21 you're Chief of Security at that time?

22 A. Yes.

23 Q. As Chief of Security, is it important for
24 you to have the cameras fully functioning?

25 A. Oh, of course.

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1 Q. Why didn't you make sure this policy was
2 adhered to?

3 A. As far as reporting it, or getting them
4 fixed?

5 Q. Well, I would assume that the reason you
6 report it is so it gets fixed?

7 A. So we could attempt to get them fixed,
8 correct.

9 Q. Okay. Do you just attempt to do the job,
10 or do you do the job?

11 A. We have contractors that come out to do the
12 cameras, which goes through the business office, get
13 the contractors to come out to work on the cameras,
14 to look at the cameras. Then they tell you what's
15 wrong with them. They give you a quote to get them
16 fixed. And you have a certain amount of time to get
17 them fixed. You exceed that time, then you start the
18 whole process all over again.

19 Q. Which would be why you'd want 48 hours
20 notice, so you could start that policy as quickly as
21 possible, isn't it?

22 A. Yes.

23 Q. So it doesn't really help once every six
24 months. You could lose six months' worth of security
25 video?

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1 A. I can tell you this about getting the
2 contractors in to come fix those cameras; those
3 contractors were called in numerous times.

4 Q. But my question is nobody would know to
5 make the call unless the Warden was put on notice
6 within 48 hours of a camera going bad?

7 A. The camera system was an ongoing issue. So
8 it was an ongoing process to get the contractors to
9 come in to work on the cameras, ongoing.

10 Q. But if you're the Warden, you want to know
11 if you have a nonfunctioning camera, don't you?

12 A. Yes.

13 Q. And that's why you have this policy in
14 place?

15 A. Okay.

16 Q. No, I'm asking you.

17 A. Yes, yes.

18 Q. So at any time during the course of the
19 Molina investigation, were you aware of anybody
20 asking to see the left-hand camera in yellow pod?

21 A. No.

22 Q. Was there any interest ever expressed by
23 anybody to view any of the cameras in yellow pod?

24 A. Not that I'm aware of.

25 MR. LOWRY: No further questions, Your

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1 Honor.

2 THE COURT: Thank you, Mr. Lowry.

3 Any other defendants have
4 cross-examination?

5 Ms. Bhalla?

6 MS. BHALLA: Thank you, Your Honor.

7 EXAMINATION

8 BY MS. BHALLA:

9 Q. Good morning.

10 A. Good morning.

11 Q. I just have a couple of questions. Was
12 part of your job as -- in security to review
13 classification files on the inmates?

14 A. No, ma'am.

15 Q. Okay. Who would be responsible for that?

16 A. Several people. The unit manager and the
17 classification officer.

18 Q. And who was unit manager at the time?

19 A. That, I don't recall. Unit managers have
20 changed. They change quite often.

21 Q. Okay. So you said the unit manager. And
22 who was the other person?

23 A. Classification officer.

24 Q. And do you know who the classification
25 officer was at the time?

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1 A. I do not.

2 Q. Did you ever review the classification
3 files as part of security?

4 A. No.

5 Q. Did you ever take time to study which
6 inmates were put on which levels of restrictions for
7 security reasons? Were you aware of what, in
8 general, the pods -- were they on lockdown, or if
9 they were classified as Level 6, or classified as
10 Level 4? Would you be aware of that information?

11 MR. CASTELLANO: Objection, relevance, Your
12 Honor, this doesn't touch on the cameras.

13 THE COURT: Well, I'll give her a little
14 leeway. Let's not go too far. I don't want to turn
15 this into discovery.

16 A. That housing unit in general, it housed the
17 SNM.

18 Q. And what does that mean?

19 A. They're Level 4s.

20 Q. And were they treated as Level 4s after the
21 homicide, do you know?

22 MR. CASTELLANO: Objection, relevance.

23 THE COURT: What's the relevance of this to
24 the motion to suppress?

25 MS. BHALLA: Well, I'm trying to understand

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1 exactly what his role was in security at the time,
2 and how they were reviewing the files. It may be a
3 little far afield, Your Honor, and it's my last
4 question.

5 THE COURT: I think we're getting a little
6 far afield. Sustained.

7 MS. BHALLA: Thank you, Your Honor.

8 THE COURT: Thank you, Ms. Bhalla.

9 Anyone else have any other
10 cross-examination of Mr. Edgman?

11 All right. Mr. Castellano, if you wish to
12 redirect Mr. Edgman.

13 MR. CASTELLANO: Thank you, Your Honor.

14 THE COURT: Mr. Castellano.

15 REDIRECT EXAMINATION

16 BY MR. CASTELLANO:

17 Q. Deputy Warden, you were asked about the
18 sectors, once again, in terms of what was captured.
19 I'm going to show you Rudy Perez' Exhibit F. You
20 said on cross-examination you had -- based on your
21 experience -- an idea of what would have been cut out
22 if the right camera was not working. Can you just
23 draw a line on the diagram approximating where you
24 think would have been cut out. We'll see the video
25 eventually, but from your experience, what would have

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1 been cut out by the absence of a working camera on
2 the right side?

3 MS. JACKS: Objection; that misstates his
4 testimony.

5 THE COURT: Well, he can clear it up if he
6 disagrees with it. Overruled.

7 Q. Okay. So for the record, you've drawn
8 basically a cut-out of this exhibit with a line
9 between cells 114 and 115; is that accurate?

10 A. Yes, sir.

11 Q. So if a right camera was not working, is it
12 fair to say you couldn't see that portion that's been
13 cut out?

14 A. Correct.

15 MS. JACKS: Same objection; misstates the
16 testimony.

17 THE COURT: Overruled.

18 Q. Let me ask that again. So you cut out a
19 section of this diagram which cuts out exhibits
20 115 -- or cells 115 and 116; is that your
21 approximation of what would not be captured by the
22 cameras?

23 A. Yes, sir.

24 Q. And did you know cell 115 to be Rudy Perez'
25 cell?

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1 A. I do now.

2 Q. You were asked about this policy regarding
3 the cameras, and a number 5, on Rudy Perez KK. This
4 is page 3 of the exhibit, talks about reporting
5 cameras to the Warden within 48 hours. Now, do you
6 actually know whether or not that part of the policy
7 was followed?

8 A. I'd say it wasn't.

9 Q. Okay. Now, let me ask you this. Were you
10 responsible for reporting every outage of the
11 cameras, or were there others who were also
12 responsible?

13 A. There is others that are responsible.

14 Q. So, as far as you know, you may not have
15 done this, but you can't speak for others?

16 A. Correct.

17 Q. Now, when the security system or the camera
18 system was first put in place, did that come with a
19 means of maintaining those cameras? Was there
20 anything tied to that contract which meant people
21 would come out routinely and monitor and fix those
22 cameras?

23 A. I'm not aware of that.

24 Q. In other words, each time you became aware
25 of a camera not working, did you or others as far as

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1 you know put in a work order to get cameras repaired?

2 A. Yes.

3 Q. What would be some of the problems when you
4 tried to get cameras repaired?

5 A. So I believe the contractor at the time was
6 HEI. So they would contact the contractor. The
7 contractor would come out, give us an estimated cost
8 of what, you know, it would cost to either replace
9 DVRs, replace cameras; tell us what was wrong. And
10 then we would have 30 days to get the purchase order
11 together to have them come out and abide by that
12 quote. After 30 days, if there was no purchase order
13 in place, then the contractor would have to come back
14 out, give another analysis of the system and a new
15 quote.

16 Q. To the best of your knowledge and
17 recollection, tell us about the fastest repair that
18 you witnessed and the slowest repair that you
19 witnessed.

20 A. None.

21 Q. Well, in other words, how fast have you
22 seen a camera get repaired?

23 A. I never saw a camera get repaired by HEI.

24 Q. Well, in terms of knowing that a camera was
25 repaired. Let's say you had a report that a camera

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1 wasn't working, there is a work order, and then the
2 camera appears to be working. So based on that part
3 of your experience, what can you tell us?

4 A. I never saw it happen.

5 Q. Now, how regularly were you aware of work
6 orders being put in to repair the cameras?

7 A. I couldn't give an exact amount or when
8 they're put in. I know what I did on my part as far
9 as getting with the business office to get the
10 contractors to come in to look at things.

11 Q. Tell us about your part.

12 A. In my part, after I submit the
13 documentation with the Warden, I'd get with the
14 business office, let them know that we have issues
15 with our camera system. And in turn, they would go
16 contact the contractor who was in charge of the
17 camera system.

18 Q. Can you tell the Court whether you do this
19 on a regular basis?

20 A. Constantly.

21 MR. CASTELLANO: I pass the witness, Your
22 Honor.

23 THE COURT: All right. Mr. Edgman, you may
24 step down. Is there any reason Mr. Edgman cannot be
25 excused from the proceedings?

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1 MR. CASTELLANO: No, Your Honor.

2 MS. FOX-YOUNG: No, Your Honor.

3 THE COURT: All right. You're excused from
4 the proceedings. Thank you for your testimony.

5 All right. Ms. Armijo, Mr. Castellano,
6 does the Government have further witnesses or
7 evidence it wishes to present?

8 MS. ARMIJO: Not as to this motion, Your
9 Honor.

10 THE COURT: All right. How about Mr.
11 Perez? Does he have further witnesses or evidence he
12 wishes to present in rebuttal?

13 MR. VILLA: We do not, Your Honor. And
14 that includes Mr. Wright, so he can be released from
15 the writ.

16 THE COURT: So we don't need Mr. Wright.
17 All right. So are you done with, then, the evidence
18 portion?

19 MR. VILLA: We are.

20 THE COURT: Do you want to argue in support
21 of your motion?

22 MR. VILLA: Ms. Fox-Young would, Your
23 Honor.

24 THE COURT: All right. Ms. Fox-Young.

25 MS. FOX-YOUNG: May it please the Court,

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1 Your Honor.

2 THE COURT: Ms. Fox-Young.

3 MS. FOX-YOUNG: As the Court heard in
4 opening argument, Mr. Perez argues that the Court
5 should suppress all evidence pertaining to the walker
6 and the video in this case. I won't detail the
7 litany of evidence, unless the Court would like to
8 hear it.

9 On the basis of both Trombetta, and if the
10 Court moves to Youngblood, Youngblood. It's our
11 position that based upon the evidence that the Court
12 has heard, and that we have submitted and detailed in
13 the pleadings and the attachment to our reply, the
14 evidentiary value of the walker was -- it was clearly
15 apparent that it was exculpatory very near in time to
16 the Molina murder.

17 The Court has heard evidence from the case
18 agent, State Police, that he heard directly from Mr.
19 Perez that his walker had been taken, and also that
20 he had nothing to do with the murder. And I'll just
21 reiterate for the Court. I know the Court heard
22 testimony on this, but it was somewhat contradictory.
23 The transcript for Mr. Perez' interview on March 10th
24 with Agent Palomares has been admitted. And Mr.
25 Perez actually told the case agent, "They took my

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1 walker today saying a part was missing off my walker.
2 And I was, like, you know what I mean, that was news
3 to me, you know what I mean?" He says again, "They
4 took my walker from me." He never says to Agent
5 Palomares that he was involved in the removal of a
6 piece. He says again, in response to Agent Alvarado
7 and Agent Palomares, "You know what I mean, they came
8 and they said a piece was missing off my walker,"
9 meaning STIU had.

10 The Court heard a litany of evidence from
11 various STIU officers and other Corrections
12 Department employees and personnel about the fact
13 that the investigators on this case never were able
14 to rule out a separate source for shanks. They don't
15 know, to this day, where they came from.

16 And the Court heard a lot of testimony
17 about the wheelchair program. Agent Palomares
18 himself, and the Government in their response say,
19 you know, we think this metal actually came from the
20 wheelchair program, from a wheelchair. The Court
21 heard this morning the Major testify that it
22 certainly is -- this piece certainly could have come
23 from other walkers in the wheelchair program. That
24 was Mr. Mulheron.

25 The Court heard significant testimony

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1 impeaching Agent Palomares from Mr. Holguin that he
2 knew from multiple sources about metal coming out of
3 the wheelchair program. He testified that not only
4 did he submit this to the head of STIU at Southern,
5 Coordinator Blanco, but he gave it all to Agent
6 Palomares. He gave every memo to him, including a
7 memo that we received yesterday, which the Government
8 represents it had not seen until yesterday, that
9 states that Mr. Perez -- and this is our Exhibit
10 PP -- that Mr. Perez actually advised Ernie Holguin
11 that he had found that a metal part was missing from
12 the walker weeks prior, three to four weeks prior.

13 He describes -- and Mr. Holguin asks if he
14 had a purple walker; totally different from the
15 walker photographed and purported to be Mr. Perez'.

16 And this is clearly Brady, first of all,
17 Your Honor, and should have been produced long ago,
18 highly relevant to the Court's inquiry here as to the
19 exculpatory nature of this walker. I mean, the
20 Corrections Department knew it. They -- we don't
21 know today, because we haven't heard from a witness
22 who will own up to having confiscated it and seized
23 it -- we heard that it was seized in the process of
24 shakedowns. We've heard that somebody took it and
25 brought it to an office -- not an evidence room --

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1 and photographed it with these grainy photographs,
2 that don't show scale, size, color, material. But
3 they seized it, and they photographed it because they
4 knew it was important. And the reason they knew it
5 was important is because they cannot identify the
6 source of these shanks. And to this day, they can't.

7 They knew there was lot of metal floating
8 around that pod. They had informants telling them
9 exactly how the metal was getting out of the
10 wheelchair program, which is why in their after
11 action review the Warden and the folks in Santa Fe
12 said: You've got to go look at this wheelchair
13 program; this may be coming from there.

14 They didn't document any inventory.
15 Sitting here today witnesses tell you: We don't know
16 what was there and we don't know what was missing.

17 This is classic exculpatory evidence. This
18 is textbook law school Trombetta evidence. You
19 heard -- the Court heard from Mr. Ainsworth, who said
20 that Mr. Wright absolutely testified that walkers
21 like Mr. Perez' walker, which he had an independent
22 recollection of, were in the wheelchair program in
23 March of 2014. He worked in that program. He told
24 Ernie Holguin, and possibly others -- or it was
25 represented that he had actually taken metal out of

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1 the wheelchair program. I don't know that Mr. Wright
2 told him that, but Mr. Gonzalez did.

3 And so the prosecution team knew the value
4 of this walker. What we know after this hearing is
5 that it existed for some time. It was not tested.
6 It was not swabbed. It was not -- we don't know the
7 metal component. And we don't actually know how long
8 it was around. But we know that Agent Palomares was
9 apprised of all of this information, and that nobody
10 on the prosecution team was able to rule other
11 sources of metal out as a source of the weapon. And
12 so I think clearly under Trombettta, the exculpatory
13 value was apparent.

14 Even if the Court moves to the Youngblood
15 analysis -- and as we argued in opening, Youngblood
16 didn't overrule Trombettta, but if the Court moves to
17 the Youngblood analysis, and finds that it's
18 necessary for suppression that Mr. Perez show bad
19 faith --

20 THE COURT: Well, haven't I already -- as
21 at least me -- decided that you have to do that in
22 Harry? I mean, haven't I already made that sort of
23 legal determination that that's required?

24 MS. FOX-YOUNG: I don't know the facts of
25 Harry well enough to distinguish it for the Court. I

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1 think the Court may have moved quickly to find that
2 there was no apparent exculpatory value of the walker
3 before hearing evidence. And if the Court doesn't
4 want to hear any more argument on Trombetta, I'll
5 move to Youngblood.

6 THE COURT: Well, I'm just asking. I mean,
7 I'm not cutting you off in any way. I may need to
8 re-look at it. But at least once before I took a
9 hard look at this issue, and I thought I had
10 concluded that it's going to require a showing of bad
11 faith.

12 MS. FOX-YOUNG: Certainly under Youngblood,
13 if the Court makes a finding that the exculpatory
14 value of the walker was not apparent, even after
15 hearing that the Corrections Department seized it;
16 that there was a lot of talk about whether or not the
17 piece came from it or from another source --

18 THE COURT: It would seem to me that, if
19 anything was apparent -- and I'm not sure where I'm
20 going to go on the apparent part of -- if anything
21 was apparent, it was not that it was exculpatory, but
22 that it might have been inculpatory. Because it
23 seems to me the people that were focusing on Mr.
24 Perez were looking at him from a possible player in
25 it. Those people who were not focusing on him would

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1 not have been looking at inculpatory. So it's hard
2 to match up your people in a way that would get you
3 to the point where the people that were focusing on
4 Mr. Perez were looking at that as inculpatory. It
5 seems to me it's the opposite.

6 Your thoughts on that? Maybe I'm missing a
7 piece of evidence that would get you to where you
8 need to go. But it seems to me, anybody that was
9 focusing on Mr. Perez were looking at him in an
10 inculpatory way. And everybody that wasn't focusing
11 on him wouldn't have been focusing on the walker as
12 an exculpatory piece of evidence.

13 Does that make sense?

14 MS. FOX-YOUNG: I think the Court is right
15 that that was the focus of the witnesses. However,
16 it's an objective standard under Trombetta and under
17 Youngblood.

18 And so, back in 2014, it's apparent from
19 all the testimony, that nobody seemed to care about
20 chasing down the source of those shanks. Yet, in
21 their minds, Your Honor, they did nothing to chase
22 that down, and to do anything that could quantify --

23 THE COURT: But that's the thing: If
24 nobody was interested in chasing down the shanks, it
25 seems to me that it wasn't apparent that any of that

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1 information was going to be exculpatory.

2 MS. FOX-YOUNG: Well, I think --

3 THE COURT: If anything, looking back at
4 it, you would have thought they would have gone after
5 it more vigorously as inculpatory evidence.

6 MS. FOX-YOUNG: Well, I think it's hard to
7 say. I'm not sure that the subjective -- I think the
8 subjective view of those witnesses doesn't matter
9 because it's an objective standard.

10 But if the Court wants to move to
11 Youngblood, finding that it wasn't -- the exculpatory
12 value was not apparent under Trombetta, I think the
13 Court has to find that a complete failure to
14 investigate even evidence that was seized. I mean,
15 clearly, Your Honor, they knew this walker was
16 important. If they thought it was inculpatory, why
17 wasn't it tested? Why wasn't it fit against the
18 shanks that they had?

19 But a complete failure to complete any
20 investigation. I mean, you heard testimony that --
21 from a witness who says, yes, this walker was
22 important. It was in my office. We thought it might
23 be the source. We did nothing with it. And short of
24 saying we took it outside and melted it in the
25 dumpster -- I mean, they have absolutely lost or

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1 destroyed this evidence. And as far as the value is
2 concerned, from an objective standard, the possible
3 exculpatory nature or possibly utility under
4 Youngblood, the Court has heard from Ms. Schile as to
5 what should have been done and what could be done now
6 if we had it. You know, whether --

7 THE COURT: Well, I agree with that. If
8 I'm looking, though, for -- if I'm looking for bad
9 faith, it seemed to me Ms. Schile didn't close the
10 gap. She just gave us a negligence standard; that
11 this is what, in her view, a reasonable police
12 investigation would have done. But she didn't give
13 me anything that would get me up to the bad faith
14 standard.

15 What would you -- I know you disagree on
16 the standard -- but if you were to -- if you had to
17 argue what in the evidence I've heard over the last
18 two days would get you to bad faith, what would you
19 point to?

20 MS. FOX-YOUNG: I would point, Your Honor,
21 to the firsthand knowledge that Agent Palomares had
22 of the importance of this walker, and the fact that
23 other sources hadn't been ruled out. That was from
24 Mr. Perez himself.

25 Numerous memos from Ernie Holguin.

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1 THE COURT: You think that's bad faith or
2 just not good work?

3 MS. FOX-YOUNG: I think, when this Court
4 saw the impeachment of Agent Palomares, and that
5 either he absolutely buried his head in the sand, to
6 quote Judge Posner, or lied on the stand -- and I'm
7 not saying he did -- but it's one or the other. He
8 received this information from Ernie Holguin as to
9 all these other sources of metal; the fact that metal
10 was coming in; the fact that Mr. Perez told him the
11 part had been missing for three or four weeks, all
12 these memos that the Court saw that are in evidence,
13 either received those and threw them in the trash --
14 which is clearly bad faith -- or he lied to the
15 Court. And the same thing with the witness this
16 morning of their own.

17 So I don't know what the point a completely
18 botched investigation --

19 THE COURT: Well, let's pause on that.

20 What's your position? Do you think he lied
21 to the Court, or do you think that he was up to
22 monkey business when he was throwing that material
23 out? What's your theory?

24 MS. FOX-YOUNG: Your Honor, I'm not -- I
25 don't think it matters. Either way, it's bad faith.

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1 Either -- I mean, you're the case agent for the New
2 Mexico State Police investigating a murder --

3 THE COURT: But you're making a closing
4 argument here. Tell me what you want me to find.
5 When I make my findings of fact, do you want me to
6 find monkey business at the time, or that he came
7 into federal court and lied here yesterday?

8 MS. FOX-YOUNG: I think that, with respect
9 to each of these witnesses, the Court has to make a
10 credibility determination. And --

11 THE COURT: Was he telling the truth
12 yesterday, or was he -- I mean, do you want me to
13 find that the bad faith occurred back when he threw
14 out the material, or the bad faith occurred -- or
15 that he was lying yesterday? And if he was lying
16 yesterday, what is the story here? What's the story
17 he's lying about? I mean, he came in and seems
18 rather credible, because how does it help him to say
19 he just tossed it out?

20 MS. FOX-YOUNG: It's hard to explain why
21 you didn't actually preserve exculpatory evidence and
22 why you didn't do anything to chase down the source
23 of the murder weapon.

24 THE COURT: But if you're going to lie,
25 wouldn't you come in and say, I never had it?

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1 MS. FOX-YOUNG: Which is what he said, Your
2 Honor. He said that he did not receive those
3 materials from Ernie Holguin; that he never saw a
4 walker; that he never saw any evidence of a walker;
5 that he never talked to anybody about the walker.
6 And then the Court heard all these witnesses from the
7 Corrections Department say: We were totally focused
8 on the walker, we seized the walker, we photographed
9 the walker, we talked to people about the walker.

10 I just don't think it stands to reason that
11 the case agent didn't know about it. Maybe he forgot
12 about it. But the important thing is that at the
13 time he received these materials. And it was -- at
14 some point I think the Court has to find that it's
15 bad faith not to -- I mean, this is a case agent for
16 New Mexico State Police investigating a murder. How
17 do you not look into the source of the murder weapon?

18 Now, the fact that the State didn't care
19 about a broader conspiracy in 2014, and the feds have
20 picked it up and cast a wide net, I think, is
21 immaterial. The source of that --

22 THE COURT: Why is that immaterial?
23 Because it seems to me it's the bad faith at the time
24 of the evidence gathering that I have to focus on.
25 Would you agree?

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1 MS. FOX-YOUNG: I would agree.

2 THE COURT: So, if for some reason, they
3 didn't make a broader investigation, isn't the fact
4 that the United States has decided to broaden the
5 investigation, isn't that really relevant? Because,
6 otherwise, Mr. Perez wouldn't be in this case, or in
7 any case. And that has to explain -- it's the United
8 States' plowing here that's picked up Mr. Perez.

9 MS. FOX-YOUNG: Your Honor, let me be more
10 precise. At the time of the investigation, in March
11 of 2014, the Court heard testimony from witnesses
12 that everybody in those pods was a suspect. They
13 talked to as many people as they could. Everybody
14 who is SNM validated or suspected was a suspect.
15 They didn't know who committed that murder. And the
16 reason they talked to Rudy Perez was to find out
17 where the thing came from.

18 And so the fact that they didn't follow-up
19 on those leads I think is immaterial. The fact that
20 Agent Palomares absolutely disregarded clear
21 exculpatory evidence -- maybe the Court finds that
22 it's potentially exculpatory, but I think you have to
23 find that the walker itself -- I'll tell you this:
24 Had the Corrections Department ruled out the
25 wheelchair program as a source, if they put on

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1 witnesses who said: We know this came from the
2 walker, here are all the reasons that we know that,
3 it would be clearly inculpatory, and we would have no
4 argument.

5 But they told the Court the opposite. I
6 think much to the Government's surprise. Witness
7 after witness said: We don't know where this thing
8 came from. It could have come from the walker; it
9 could have come from somewhere else. In fact, there
10 was a lot of hard evidence that it did come from
11 somewhere else. And that was all known at the time.
12 That was all -- I mean, whether Agent Palomares will
13 cop to it or not, I think a very credible witness, in
14 Ernie Holguin, testified he provided it all. He had
15 a very distinct memory. And he's the only witness
16 who documented anything. It's all in his memos, and
17 he provided it. Nobody else -- I mean the
18 Government's theory isn't documented in notes. There
19 is no report as to what happened to this thing.

20 So I think if the Court is going to make a
21 credibility determination, it's got to be that Ernie
22 Holguin was believable when he said he gave all this
23 to the case agent.

24 THE COURT: Well, tell me the credibility
25 determination. If you want to write my opinion and

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1 my facts, who lied and what did they lie, and what
2 then was the truth?

3 MS. FOX-YOUNG: The truth is that the
4 prosecution team had the information that this walker
5 was exculpatory, and this video was potentially
6 exculpatory at the time of the murder. I think that
7 is clearly elicited in the testimony. Witness by
8 witness, and I think that comes from Ernie Holguin --
9 you know, clear impeachment of Agent Palomares --
10 whether Agent Palomares was lying or misremembering
11 he's got documented material that he turned over. If
12 the Court looks closely at Defendant's Exhibit PP,
13 it's really material to this question as to what they
14 knew.

15 Now, because of the nature of this
16 investigation, it's easy for the Government to say,
17 Well, STIU knew this, and Santa Fe knew this, and
18 State Police knew this. But they can't point fingers
19 in opposite directions and claim that nobody was
20 responsible for carrying out the investigation.

21 And so, as a unit, as a whole, the
22 Corrections Department, working hand in hand with
23 State Police, they had this information and they
24 disregarded it. I think Agent Palomares clearly lied
25 to the Court when he said he didn't know that the

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1 walker was in play. If I were the Court, I would
2 make that finding based upon the testimony. That's
3 presumptuous of me, but since the Court has asked how
4 I would write the findings.

5 I think Major Mulheron this morning was
6 less than honest when he said he didn't know what
7 happened to the walker. He knew the shank may have
8 come from another walker. And nobody has come
9 forward to tell this Court what happened to the
10 thing. The Court has heard that, you know, for the
11 first time in history this critical piece of evidence
12 that might have been the source of a murder weapon
13 was held in somebody's office.

14 I mean, I can go on and on about how the
15 investigation was odd, and evidence wasn't preserved.
16 And I think the Court has to take that into
17 consideration when you make a bad faith
18 determination. At what point do we go over the
19 precipice and say: You have to conduct a real
20 investigation. You cannot just ignore significant
21 evidence. I don't know if that answers the Court.

22 THE COURT: Well, I guess the thing that's
23 somewhat telling to me is that when the State did its
24 prosecution, it didn't go this direction with Mr.
25 Perez. So I find that to be very telling, that they

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1 did their thing, and the United States is doing their
2 thing.

3 MS. FOX-YOUNG: Well, is the Court
4 asking --

5 THE COURT: Well, I mean, it sort of fits.
6 I mean, you brought in a lot of people that were back
7 there. And they weren't focused on Mr. Perez or this
8 walker. And that's exactly where the prosecution
9 went, too. They didn't focus on Mr. Perez.

10 MS. FOX-YOUNG: Well, and the prosecution
11 dismissed folks out. I mean, the State case looks
12 entirely different for a whole bunch of reasons.

13 THE COURT: But isn't that very
14 significant?

15 MS. FOX-YOUNG: I don't think so, because
16 in any investigation --

17 THE COURT: They dismissed the State case;
18 the feds take over, and it went a different
19 direction. But the fact that nobody in the State was
20 interested in Mr. Perez and his walker, I don't know,
21 I think that's of some significance.

22 MS. FOX-YOUNG: It is of significance. But
23 it is the job of investigators, it is the job of
24 State Police to ferret out the evidence.

25 THE COURT: If the feds hadn't been around

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1 here, you wouldn't be complaining about their
2 investigation, right?

3 MS. FOX-YOUNG: They wouldn't be here for
4 me to complain about.

5 THE COURT: Let's take this up after lunch.

6 All right. We'll be in recess for about an hour.

7 I'm going to leave the building, so depending on how
8 quickly we get food. I'm not going to start without
9 anybody.

10 (The Court stood in recess.)

11 THE COURT: All right. Let's go on the
12 record. I think everybody has now got counsel here.
13 Look around the room, make sure everybody has got
14 counsel.

15 All right. Mr. Granberg, looks like you're
16 joining us for the afternoon.

17 MR. GRANBERG: Yes, Your Honor.

18 THE COURT: Good afternoon, Mr. Granberg.

19 Mr. Burke, you're going to leave after the
20 first break; is that correct?

21 MR. BURKE: Yes, Your Honor.

22 THE COURT: All right. So be safe on your
23 travels.

24 MR. BURKE: Thank you, Your Honor.

25 THE COURT: Are there any other changes?

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1 Anybody on the phone?

2 MR. CASTLE: Yes, Your Honor. Jim Castle.

3 I'm on the phone.

4 THE COURT: All right, Mr. Castle.

5 All right. Ms. Fox-Young, do you wish to
6 continue your argument?

7 MS. FOX-YOUNG: Thank you, Your Honor. I
8 believe, when we left off, the Court was asking what
9 our position is as to the fact that the State did not
10 charge Mr. Perez in the State case. And I think the
11 Court wonders what knowledge -- I won't speak for the
12 Court, but what knowledge could be imputed, or what
13 the exculpatory -- what the apparent or potential
14 exculpatory value of evidence is, if these
15 investigators aren't going after Rudy Perez. Is
16 that --

17 THE COURT: Well, I guess -- let me break
18 it down a little bit, because I probably was merging
19 two things. But one is on the, sort of, first prong,
20 the Trombetta prong. It seems to me that, if the
21 prosecution didn't focus on Mr. Perez, it's more
22 difficult for you to say that the walker was either
23 exculpatory -- of exculpatory significance, or that
24 it was apparent before destruction, so it seems to
25 me, if the whole sweep of the investigation is more

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1 difficult to say than it was apparent, because it was
2 focused.

3 And then the second thing -- I think this
4 is where we were talking -- is that it seems
5 difficult to say, if we get into the bad faith, that
6 they were acting in bad faith, given that nobody was
7 focusing on Perez, even through the State
8 prosecution.

9 MS. FOX-YOUNG: Okay.

10 THE COURT: So it sort of goes, I think, to
11 both your Trombetta argument, and also to the bad
12 faith, the Youngblood.

13 MS. FOX-YOUNG: And I would just say that I
14 think the Court is right to point --

15 THE COURT: Take the first one first.

16 Let's go back and plow a little bit the Trombetta,
17 because I jumped a little bit to the bad faith. But
18 go back and plow that a little more.

19 MS. FOX-YOUNG: Yes, Your Honor.

20 I think the Court is right to point out
21 that the New Mexico Corrections Department and, of
22 course, the district attorney, did not, perhaps, have
23 Mr. Perez in their sights as investigation matured.
24 But I think that also cuts other way, Judge, and that
25 is because he wasn't charged. You know, so what --

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1 and we maybe know a portion of what the Corrections
2 Department did with that walker. We know that it was
3 seized, confiscated, inspected to some degree,
4 photographed. And they didn't charge Mr. Perez. And
5 so there --

6 THE COURT: If you're not charging, you're
7 not focusing, is really the Government -- and I think
8 would it be the State officials would be charged with
9 this -- can you really charge them with, you know,
10 looking for exculpatory evidence? I mean, generally,
11 you begin to look at exculpatory evidence when you're
12 focusing on someone as a suspect or target. Not
13 looking for exculpatory evidence of people you're not
14 targeting.

15 MS. FOX-YOUNG: Well, I think in doing
16 this --

17 THE COURT: I mean, your argument is --
18 almost has to be that they should have been targeting
19 Mr. Perez from the very beginning, and therefore,
20 they should have been looking for exculpatory
21 evidence from the very beginning.

22 MS. FOX-YOUNG: Yes, Judge. And I think,
23 either under Trombetta or Youngblood, in assessing
24 the value of the evidence, in doing the analysis, the
25 Court should look, not -- I think it's irrelevant

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1 what the DA decided to do, vis-a-vis Mr. Perez. What
2 is relevant is that all these folks with the
3 Corrections Department, part of the prosecution team,
4 whenever they were working, and Agent Palomares, the
5 case agent -- whether or not they'll admit it -- were
6 focused on Perez. They interviewed him. They say
7 that's why they took the walker. They thought it
8 might have come from him. They were exploring that.
9 And they're the ones that lost the evidence. It's
10 not the DA who made that decision.

11 So we have to look early on. This is
12 structurally a little bit strange, because the
13 investigation was conducted in 2014, and after the
14 State case dropped, the feds bring it up. But the
15 feds are relying on this investigation, and they've
16 worked hand in hand with this team. And so I think
17 the Corrections Department is either part of the team
18 or not.

19 Objectively, they had to know, when they
20 were looking at Mr. Perez as a suspect in that pod,
21 that this piece of evidence had exculpatory value.

22 THE COURT: Well, let's back up for a
23 second, because don't you have to establish that for
24 it to be apparent that it was exculpatory before
25 destruction, don't you have to first establish that

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1 it's apparent and obviously exculpatory now? And if
2 it's not, then it's kind of irrelevant, a lot of the
3 things you and I are talking about, because isn't it
4 your duty to establish, right this minute, that that
5 walker, wherever it is, is exculpatory?

6 MS. FOX-YOUNG: Your Honor, I think that's
7 the easy part of the inquiry, you know, given
8 multiple -- and the answer is yes.

9 THE COURT: What is the most -- what is the
10 best evidence you have that that walker had no parts
11 missing?

12 MS. FOX-YOUNG: Well, I don't think that's
13 the only question.

14 THE COURT: But isn't it really?

15 MS. FOX-YOUNG: Well --

16 THE COURT: If you can't establish right
17 this minute that that walker -- whether it's in a
18 garbage dump or still floating around at the Pen, you
19 know, has all its parts there, then it's not
20 apparently exculpatory now; it wouldn't be apparently
21 exculpatory then, would it?

22 MS. FOX-YOUNG: I don't think anybody
23 disagrees -- in fact, Mr. Perez made a statement that
24 STIU had found a piece was missing there.

25 THE COURT: So from that alone, how can we

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1 say that the walker is obviously exculpatory?

2 MS. FOX-YOUNG: Well, because there was
3 metal all over that pod. And because this Court has
4 heard testimony from Corrections Department officials
5 that they had strong belief that walkers in the
6 wheelchair program could have produced that shank.

7 THE COURT: But it seems to me that that
8 undercuts, though, the obviously or apparently.
9 Because if that walker would show up this afternoon
10 about 3:00, you know, and it had parts missing, I
11 don't think we still could say it's apparently or
12 obviously exculpatory. You've got to take some --
13 several inferences in your direction. And the
14 Government will take some inferences in their
15 direction.

16 MS. FOX-YOUNG: And I understand, if the
17 Court doesn't feel that this is in the universe of
18 Trombettta --

19 THE COURT: Well, but argue with me. I
20 mean, I've got to first deal with your Trombettta
21 argument. So I'm grappling with it so I can write an
22 opinion on it.

23 MS. FOX-YOUNG: Your Honor, given --

24 THE COURT: Tell me what's wrong with my
25 analysis.

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1 MS. FOX-YOUNG: Given the testimony from
2 witnesses yesterday and today that the shanks may not
3 have come from the walker. Folks who were on the
4 prosecution team telling this Court that they believe
5 the shanks could have come from the wheelchair
6 program; that was not. There are inmates who say
7 metal was coming in from the wheelchair program.

8 It's a strange coincidence that, in March
9 of 2014, there were walkers of the same type as Mr.
10 Perez' in the wheelchair program where SNM, or at
11 least blue and yellow pod inmates were working. And
12 so I think the Court has to grapple with that; that
13 there has been strong testimony that the shanks may
14 not have come from the walker. It's unusual to see a
15 case like this, where perhaps there is an identical
16 walker with missing pieces in the wheelchair program.

17 The Court has heard evidence that there was
18 no inventory. The Government doesn't know what may
19 have been missing. And so from the defense
20 perspective, and even from an investigative
21 perspective, you can't rule out a very obvious
22 source. And you have multiple individuals telling
23 you that's where they think it came from. There is
24 apparent exculpatory value. How do you not --

25 THE COURT: But you've shifted now to

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1 Youngblood with that language, would you agree?

2 MS. FOX-YOUNG: Apparent exculpatory value?

3 THE COURT: Well, if it's indeterminate --

4 I mean, isn't that what Youngblood is saying? If
5 it's indeterminate, exculpatory value, you just don't
6 know. You've got a walker back there that has pieces
7 missing. That seems to be the best we have. So
8 that's indeterminate as to which way it goes, whether
9 it's exculpatory or not. And that could be used very
10 much against the defendant. Here's your walker, it's
11 missing pieces.

12 MS. FOX-YOUNG: And I think drawing the
13 line there, you may never have anything that
14 satisfies the Trombetta standard.

15 And Youngblood didn't overrule Trombetta
16 And I understand where the Court is coming from. I
17 can't say, standing here today, that it absolutely,
18 you know, would prove -- if we had the walker here
19 today and could test it, that it absolutely would
20 prove to be exculpatory. But it clearly has value
21 and should be tested. I think that is what is
22 apparent.

23 THE COURT: It seems to me, once you make
24 that argument, you shift over to Youngblood. That's
25 my only point, is once I hear those words out of your

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1 mouth, it sounds to me like we're in Youngblood. And
2 if that's your point, we both agree, you've got to go
3 the bad faith route.

4 MS. FOX-YOUNG: I think, given the
5 testimony, we meet the Trombetta standard. But I
6 understand the Court's reluctance to find that it
7 absolutely was apparent. We think it was apparent.
8 We think that, according to these witnesses, it was
9 apparent.

10 THE COURT: It seems to me the witnesses --
11 the best you can probably establish is that it's an
12 interesting piece of evidence. But it's not
13 exculpatory. I didn't think you got really somebody
14 to say, Yeah, that -- we were looking at it, and it
15 was all together and it was exculpatory.

16 MS. FOX-YOUNG: Well, I mean, if the Court
17 would like, we can move to Youngblood.

18 THE COURT: All right.

19 MS. FOX-YOUNG: And I know the Court did
20 look at Youngblood closely, and Harry, and the other
21 cases. I know the Court is familiar with the factors
22 from the Bohl case, Tenth Circuit, and the inquiry
23 that must be made into bad faith. I think clearly
24 the Government knew, the Corrections Department and
25 State Police knew, at the time that this walker was

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1 lost or destroyed or whatever happened to it, that it
2 had evidentiary value, and that it should be tested.

3 I mean, witnesses have told the Court that they
4 examined it; that they kept it. We don't know what
5 happened to it after that. But that, without testing
6 it, essentially, they couldn't rule out whether or
7 not it was the source of the murder weapon.

8 THE COURT: What test would you really have
9 done here?

10 MS. FOX-YOUNG: Well, for one thing, Your
11 Honor, I think the test that the prosecution claims
12 to have done, that we haven't heard evidence was
13 done, of simply taking the pieces that were recovered
14 and comparing them to the walker. I mean, the
15 Government has told you that they make a perfect fit.
16 We haven't heard evidence of that. But that might be
17 the first think that any layperson would do. I think
18 the Court heard a lot about forensic testing that
19 could be done. We don't know whether it's the same
20 sort of metal, the same color, the same dimensions.
21 I mean, they are pretty basic testing, which maybe it
22 was done, and witnesses haven't told this Court about
23 it. But all of those things would comprise a pretty
24 basic investigation to determine the source.

25 THE COURT: If you were to point to a

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1 case -- do you have a case in which the Court has
2 concluded, from anywhere, Tenth Circuit or otherwise,
3 in which the Court concluded that failure to do tests
4 is going to rise to the level of bad faith?

5 MS. FOX-YOUNG: I don't think we're arguing
6 that it was the failure to do tests. I mean, I think
7 it's the failure to preserve it so it could be
8 tested.

9 But the Court has heard that the
10 Corrections Department didn't even follow their own
11 policies and procedures as to preserving this
12 evidence. When they took it in, they put it in an
13 office, photographed it, in blatant disregard of
14 their own policies.

15 And I do think there are cases -- let me
16 see if I can cite to the Court -- that address that,
17 that sort of circumstance. I think Agent
18 Palomares -- and I don't know what the Court's
19 findings will be with respect to the knowledge that
20 he had at the time of the investigation --

21 THE COURT: If you were writing it, what
22 would you say I should say about that?

23 MS. FOX-YOUNG: That based upon the
24 testimony of the other witnesses, he completely
25 disregarded and failed to consider clearly

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1 exculpatory evidence pertaining to Mr. Perez. And
2 that is, for one thing, the memo from Mr. Holguin
3 that states that Mr. Perez said that the piece had
4 been missing since February. Didn't chase that down
5 at all. All of the information that was coming from
6 informants that these shanks came out of the
7 wheelchair program.

8 And so -- and then, even if the Court finds
9 that a failure to investigate is in bad faith, I
10 think to come into this Court and demonstrate that
11 all that material was disregarded, or to lie to the
12 Court, shows bad faith.

13 At some point --

14 THE COURT: But do you look at the bad
15 faith that's going on now?

16 MS. FOX-YOUNG: Bad faith in the course of
17 the investigation, which is continuing. I mean,
18 today, we've had production of Brady materials, today
19 we've had production of materials pertaining to the
20 cameras that recorded the homicide. I mean, the
21 investigation has been ongoing since March 7, 2014.
22 So yes, I think the bad faith continues. I think the
23 analysis of whether or not there is bad faith
24 continues.

25 The pertinent period for the Court -- the

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1 Court obviously is focused on March of 2014, and what
2 happened to that walker, and whether agents acted in
3 bad faith. But I think it's very telling that the
4 case agent was pretty severely impeached by STIU
5 officers who say he had all this information. And
6 Palomares said he didn't explore it.

7 There is a case I'd like to cite for the
8 Court, United States v. Elliott, which is 83 F.Supp.
9 2d 637, it's out of the Eastern District of Virginia
10 from 1999, and --

11 THE COURT: Who is the judge on it?

12 MS. FOX-YOUNG: That's a good question,
13 Your Honor. Let me see if I can pull it up. Let me
14 give the Court first a pin cite. It's at 650 to 51.
15 And the Court there discusses that -- it's Judge
16 Payne, P-A-Y-N-E. The Court discusses the fact that
17 it was -- the Government was arguing that it was
18 stupid for the DEA agent to have destroyed evidence;
19 said it wasn't in bad faith, because bad faith can
20 only be found if there is specific intent. And the
21 court addresses how Trombetta and Youngblood analyses
22 play into that, and says the bad faith really isn't
23 confined to the circumstance in which a DEA agent
24 deliberately says: I'm going to deprive the private
25 defendant of due process or hurt his case. That,

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1 basically, can't be the test. Because if that's the
2 test, there is nothing to stop -- there is no line to
3 draw to place a check on the destruction of evidence.
4 And in every case, law enforcement agents would be
5 able to defend the destruction of evidence, as they
6 are here, by lying about their subjective intent, or
7 by violating with impunity the rules they're
8 obligated to follow. It's an objective standard,
9 Your Honor. And think the Court -- any law
10 enforcement officer can come in and say: I didn't
11 know, I didn't care to know, I can't remember.
12 That's not the standard. I mean, this is clearly
13 highly relevant evidence. Corrections Department
14 knew that; that's why they confiscated the walker;
15 that's why they took it in to STIU. That's why they
16 took pictures of it. That's why they questioned Rudy
17 Perez, that's why they questioned all these other
18 guys.

19 And for them to come in now and say, Well,
20 we just don't know what happened. It was in my
21 office. I remember all these other specifics, but I
22 just can't tell you what happened to it. I think
23 that's bad faith. And Judge Payne speaks to that.

24 I would like to make another -- I don't
25 want to jump the gun, if the Court has other

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1 questions about the bad faith inquiry, but I would
2 like to --

3 THE COURT: Go ahead.

4 MS. FOX-YOUNG: On the question of whether
5 a remedial jury instruction is proper, this is a
6 somewhat active area of law. And I know in the
7 opening, the Court asked whether the civil standard
8 applies. And I know the Court is very familiar with
9 the Henning case and spoliation claims in the civil
10 context. I don't think it applies in the due process
11 context. I think the Court should look at this
12 through a different lens.

13 THE COURT: What is the difference between
14 the civil standard and bad faith? I'm having trouble
15 seeing in the Tenth Circuit spoliation jurisprudence
16 how it's different than bad faith, which is the words
17 the Supreme Court used. Do you have any thoughts on
18 that?

19 MS. FOX-YOUNG: I don't know that the Tenth
20 Circuit has construed that point. I haven't found a
21 case on that. But other circuits have. There is a
22 case out of the first circuit, United States v.
23 Flores-Rivera, 787 F.3d 1, at 19, and Note 13, which
24 says: Negligent destruction of a particular piece of
25 evidence likely to be exculpatory might justify an

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1 instruction, a spoliation instruction.

2 THE COURT: Isn't that where the Tenth and
3 the First differ, is that the Tenth -- the First
4 sometimes -- some of the other circuits will give you
5 negligence, but the Tenth won't.

6 MS. FOX-YOUNG: In the civil context?

7 THE COURT: In spoliation?

8 MS. FOX-YOUNG: That may well be. I can't
9 say I know exactly the jurisprudence out of the First
10 Circuit on the civil --

11 THE COURT: I thought that's what made the
12 Tenth a little bit -- about the highest standard.
13 I'm not saying they are the highest, but they employ
14 the highest standard as far as spoliation before you
15 start giving those instructions.

16 MS. FOX-YOUNG: I think the difference in
17 the criminal context is the Court has to look to
18 prejudice to the defendant. This is all through the
19 lens in the context of a due process inquiry.

20 So, even if the Court finds -- and I think
21 the Court has ample evidence to make a finding of bad
22 faith here -- but even if the Court finds that this
23 falls short of bad faith in some way, looking at a
24 remedial jury instruction in the criminal context is
25 different.

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1 And as I said, I don't have a Tenth Circuit
2 cite for the Court. There is another case out of the
3 Ninth Circuit, United States v. Sivilla, which is
4 Noonan from 2013, finding that bad faith is not
5 required for a remedial jury instruction. And that
6 again, you're looking at negligent destruction of
7 evidence. I think the Court clearly has found there
8 was negligence here. Well, the Court hasn't made any
9 findings, but seems to have observed that. And that
10 you look at significant prejudice to the defendant.

11 There has got to be some mechanism for the
12 Court to address the fact that the linch pin of the
13 Government's case here, the walker that is alleged to
14 have produced the murder weapon, the case against
15 Rudy Perez, you know, the walker is missing, and
16 there is no explanation for why. I mean, clearly, it
17 was important to the prosecution team at the time, in
18 2014. And there has not been a reasonable
19 explanation to the Court.

20 Bohl speaks for that in the bad faith
21 inquiry. You know, whether the Government is able to
22 offer an innocent explanation for its failure to
23 produce evidence. I don't think the Court has heard
24 that.

25 And so, of course, we think there is ample

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1 evidence for the Court to make that bad faith finding
2 if the Court turns to Youngblood. But we want the
3 Court to also consider the value of a remedial
4 instruction here, as we get closer to trial.

5 THE COURT: All right. Anything else, Ms.
6 Fox-Young?

7 MS. FOX-YOUNG: Not at this time, Judge.

8 THE COURT: Thank you, Ms. Fox-Young.

9 Mr. Beck, let me see if any other
10 defendants want to weigh in on this debate before I
11 hear from the Government. Anyone else?

12 All right. Mr. Beck? Why don't we start
13 where Ms. Fox-Young left off. Would you concede
14 negligence?

15 MS. BECK: Well, if you notice by where I'm
16 sitting at the table there, I'm not in a position to
17 concede much. But I think --

18 THE COURT: You're at the podium.

19 MS. BECK: But I think the facts -- I think
20 the undisputed facts, I think --

21 THE COURT: Well, what --

22 MS. BECK: I think there is negligence.

23 THE COURT: What do you think about this
24 investigation? I mean, do you think it was shoddily
25 done?

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1 MS. BECK: I wrote down a note from Ms.
2 Fox-Young's closing argument just now that -- I think
3 she said -- and I want to get this right -- the
4 investigation was odd. And I would say it was more
5 than odd. I would say the evidence today shows that
6 it was not a well-performed investigation. I think
7 that losing the walker -- and there is no testimony
8 that I recall as to where that was, how it was
9 destroyed, how it was lost. I think that shows that
10 it was not a good investigation.

11 So I'm not conceding that there was
12 negligence, but I wouldn't be surprised if the Court
13 looks back at the lengthy transcript and finds there
14 was negligence.

15 But negligence doesn't meet the standard
16 under Youngblood.

17 THE COURT: Well, let's start with
18 Trombetta and go back. And maybe I'm wrong in
19 looking at it this way, but it seems like there may
20 be some evidence here that, if we had the walker
21 here, it might -- if you had other evidence, would
22 show something exculpatory.

23 MS. BECK: And that takes us -- that
24 statement right there takes us from Trombetta to
25 Youngblood.

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1 THE COURT: So you think that to meet
2 Trombetta, if somebody would wheel in, at 3:00, the
3 walker, and it had parts missing, which seems to be
4 what everybody is conceding, that because we look at
5 that and can't instantly conclude that that's
6 exculpatory, then we're out of Trombetta?

7 MS. BECK: Exactly, yes. I think to be in
8 Trombetta --

9 THE COURT: So we've got to be able to do
10 it, and the officers back then had to be able to do
11 it. They had to look at it and say: It can't go
12 either way; it's got to be apparently or obviously --

13 MS. BECK: That would take us into
14 Trombetta.

15 THE COURT: Take it out.

16 MS. BECK: No. So, if the officers back
17 then looked at Mr. Perez' walker, and saw that there
18 was no part missing --

19 THE COURT: Then that would be exculpatory.

20 MS. BECK: That would be Trombetta. That
21 would be apparently exculpatory, talking about the
22 walker then --

23 THE COURT: Is there any evidence over the
24 last two days that that was the case?

25 MS. BECK: No, there is no evidence of

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1 that.

2 THE COURT: Everybody seems to agree that
3 there were some parts missing.

4 MS. BECK: Right, exactly. And I would
5 point out to the Court some of our best evidence. I
6 think yesterday morning I said: Mr. Perez does not
7 dispute that he noticed, and told officers that the
8 walker was gone.

9 And so I will point the Court to the
10 defendants' exhibit -- I have it written down here
11 somewhere. All right. Maybe I don't. The
12 transcript of the interview with Palomares. And Ms.
13 Fox-Young began her closing argument pointing out
14 portions of the interview from March 10th of 2014.
15 And the Court should note on the front page of
16 this -- again, this is in evidence -- that this is
17 against Jerry Armenta. And that gets to the Court's
18 point, which the Court has made multiple times, that
19 no one was looking at Perez.

20 So, for the Court to read later on -- I'd
21 like the Court to start at page 19, and read
22 through -- read all the way through page 28. Because
23 in here, Mr. Perez admits to being a member of the
24 SNM. And that's on page 20. Agent Alvarado asked
25 him: "When did you get validated? When did you

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1 start with SNM?"

2 And he says, "Way back. They just barely
3 validated me in 2008, though."

4 They, meaning STIU. And now we're talking
5 about validation, not when he joined.

6 Mr. Perez has said, "I was under the radar.
7 I was on the line the whole time, then (Spanish)
8 didn't bother me because I do my time."

9 He goes on to talk about why he can't say
10 anything to law enforcement, because he would be
11 killed if he does. And he talks here -- and
12 basically, says, "I'm an old timer," this is page 21,
13 line 16. "Nobody tells me. 'Pup' don't tell me what
14 to do. Styx don't tell me what to do. Yeah, there
15 is not a motherfucker here who is going to tell me
16 what to do no more."

17 So he's saying: I don't get told what to
18 do. I don't do anything. And that lays the context
19 here for page 26, where he says, "You know what I
20 mean, and because they came and they said a piece of
21 my walker was missing" -- that's STIU.

22 Agent Alvarado says, "Yeah."

23 And he says, "When that piece came up
24 missing, I was in the shower. What was I going to
25 do? Go make a big thing about it?"

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1 And that right there is his admission,
2 which the defendants put into evidence, that he knew
3 that piece was missing from his walker. That
4 admission takes us out of the Trombetta, because now
5 we have undisputed evidence, even he admits. And
6 again, we're assuming that some portion of this is
7 truthful. But it is undisputed that the walker was
8 missing a piece right here.

9 Then he goes on to say, "I was going to
10 clean that up on my own." And that plays back into
11 the piece that no one was telling him what to do.

12 Now, I also want to point out that -- and
13 I'm jumping ahead a little bit here -- but in the
14 Court's decision in Harry, and looking back at the
15 Tenth Circuit's case in Bohl, one of the indicia that
16 we're looking for in bad faith is whether this is a
17 crucial piece of evidence, okay? And this is not a
18 crucial piece of evidence. "This" being the walker
19 in this case. Because Rudy Perez was only found
20 after the original indictment. And the Court and
21 everybody has heard this multiple times, when he
22 admitted to the CHS that he provided his walker to
23 other defendants to be made into shanks to kill
24 Javier Molina, because that is the work that he could
25 do.

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1 Okay. And this is Exhibit 16. This is
2 from the hearing on November 27, 28, 29. But they
3 were all incorporated and admitted here. Where Rudy
4 Perez now admits to Cordova, the CHS in this case,
5 that he provided his walker.

6 And so here, at the bottom of Bates 20531,
7 he says, "Rudy Perez says they came to me and they're
8 like, Big Dog, something has to be taken care of, but
9 we need squina. You don't have to do nothing. You
10 don't have to say nada. You don't have to do fuck."
11 Basically, that's when they took his walker and made
12 the shanks.

13 And again, when the Court is deciding this,
14 I would urge the Court to read through that entire
15 transcript, because in that transcript he says, I
16 have never told anyone except for you, the CHS, that
17 I did this, that I provided my walker to put in work
18 for the family.

19 And so now, again, this is the only time we
20 have competing stories from Rudy Perez throughout the
21 testimony here, that this was missing when he went in
22 the shower; it was missing two weeks earlier; they
23 took his walker on the morning of the 10th; they took
24 it the 14th. And Rudy Perez explains in Government's
25 Exhibit 16 why that is.

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1 Those statements -- and again, I will note
2 that the reason I said it was undisputed yesterday is
3 because it's on page 5 of Mr. Perez' motion here in
4 the brief, where he says, "Mr. Perez disclosed to
5 NMSP Agents Palomares and Alvarado that prior to the
6 murder, a piece of his walker went missing while he
7 was in the shower."

8 So that's why, until yesterday, I thought
9 it was undisputed. Because he pointed that out in
10 his brief --

11 THE COURT: Well -- and I didn't hear Ms.
12 Fox-Young going in a different direction on that.

13 MS. BECK: Right.

14 THE COURT: I thought she gave you that. I
15 think everybody agrees that right now, if we were to
16 find that, everybody would expect it to be missing
17 pieces.

18 MS. BECK: So now we're into Youngblood.
19 In Youngblood we have to have possible exculpatory
20 evidence -- or indeterminate, I think, is the
21 language. And I think we've got that from Ms. Schile
22 yesterday. She said, at best, it's indeterminate.

23 This is the Court's decision in United
24 States against Harry, 927 F.Supp. 2d 1185. And so
25 now I'm reading from page 1216 there. "The inquiry

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1 into bad faith must necessarily turn on the
2 Government's knowledge of the exculpatory value of
3 the evidence at the time that it was lost or
4 destroyed."

5 And that's, Your Honor, quoting the Bohl
6 decision from the Tenth Circuit, which we've talked a
7 lot about today.

8 So when we're talking about bad faith and
9 about the negligence, and about some conflicting
10 testimony today, the salient inquiry here is the
11 evidence of the Government's knowledge of the
12 exculpatory value of the evidence at the time it was
13 lost or destroyed.

14 To this date, the Government doesn't have
15 any knowledge of the exculpatory value of that piece
16 of evidence. And it never did. Because everyone
17 agrees that the walker was inculpatory.

18 THE COURT: Well, I guess right at this
19 moment, you would just as soon have that walker here
20 to wave in front of the jury --

21 MS. BECK: Precisely.

22 THE COURT: -- to show the missing pieces?

23 MS. BECK: Precisely.

24 I think everyone would agree -- and most
25 having more experience than me -- that this is a

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1 unique case, where the United States is not relying
2 on a lot of hard, or material -- material is the
3 wrong word -- hard or physical evidence. A lot of
4 our best evidence is co-conspirator statements.

5 And, here, you just saw Mr. Perez'
6 co-conspirator statement, which is our best evidence.
7 No one is hiding that. That's why he's indicted.

8 And so here -- well, we can come back to
9 that --

10 THE COURT: Hold on just a second.

11 Mr. Hammond, could you get my glasses? I'm trying to
12 read these cases.

13 Go ahead, Mr. Beck.

14 MS. BECK: So, if we look -- and I can find
15 this because I have this decision here -- but I
16 copied this note down, and I think it's a little bit
17 more clear -- this is from the Bohl decision -- "The
18 Trombettta standard of exculpatory evidence has not
19 been met here, because on the record before us, the
20 Government's test results suggest that the towers'
21 chemical composition failed to conform to the
22 contract specifications."

23 In that case, it was fraud, alleging that
24 the materials used in these towers were less than the
25 contract called for. And so, in that case, the

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1 towers were the best evidence. But because the
2 Government had some evidence that backed up its
3 theory that the towers wouldn't have been
4 exculpatory, it took it out of Trombettta. And when
5 the Court goes back and reads that decision, you'll
6 see that the possibility of the towers being
7 exculpatory --

8 THE COURT: You're talking about Bohl?

9 MS. BECK: Bohl. The possibility of the
10 towers being exculpatory was much greater than here,
11 because there had been tests performed by the
12 company, for which these defendants worked, that
13 manufactured the towers, that showed that the
14 materials actually complied with the contract. So
15 there was some physical testing evidence that showed
16 there may be exculpatory value.

17 But, as you'll see, even Bohl and Bell seem
18 to agree that it takes it out of the apparently
19 exculpatory evidence category of Trombettta.

20 And, so then we get into Youngblood. And
21 the Court -- the Tenth Circuit laid out a test, which
22 this Court adopted, looking at the text messages in
23 its Harry decision -- and I think there is some good
24 language here -- the first I'll point out -- and this
25 is on page -- this is, again, on page 910 of that

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1 decision -- the Tenth Circuit said that it had
2 previously observed that the mere fact that the
3 Government controlled the evidence and failed to
4 preserve it by itself is insufficient to establish
5 bad faith.

6 And I'd submit to the Court, that when we
7 look back, that would be the extent of the evidence;
8 that we controlled it -- not United States, of
9 course -- that STIU or NMCD controlled it, and that
10 it was lost.

11 But down at the bottom of that page, find
12 "potentially useful evidence" as evidence which,
13 quote, "no more can be said than that it could have
14 been subjected to tests, the results of which might
15 have exonerated the defendant."

16 And I think that is probably the Defendant,
17 Mr. Perez', best evidence here, is Ms. Schile's
18 testimony that she could have performed tests on the
19 walker that may have exonerated the defendant.

20 So now, we're into the bad faith. And this
21 is the test that the Court adopted. As I said, it
22 must necessarily turn on what the Government knew.
23 And so here, when we're looking at page 911 -- this
24 is what I said, is that -- I said earlier -- is that
25 there was -- "Bell and Bohl had additional

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1 independent evidence, the possibility that the steel
2 met the contract specifications. They had done tests
3 previously and it met those."

4 And that's what I'm talking about. We
5 don't have that physical probative evidence here.

6 Nevertheless, when we're looking at bad
7 faith, the first thing we do is look to notice to
8 preserve. There is no testimony that anyone put the
9 government -- whether that be New Mexico State
10 Police, STIU, or NMCD -- on notice to preserve the
11 walker before it was lost.

12 The second part is more than mere
13 conclusory potential exculpatory value. And that is
14 where they talk about TSL; the company that
15 manufactured these, had done tests on the towers
16 before, that showed the materials they were made of
17 complied with the contract, which negated the most
18 crucial piece of evidence, that the materials in
19 fact -- what the United States was saying, the
20 materials, in fact, did not meet the contract
21 specifications.

22 Here, I submit to the Court that, when we
23 look at all of the evidence, from everyone who
24 testified over the last day and a half, that all we
25 had is mere conclusory potential exculpatory value,

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1 at best.

2 So, that's two.

3 The third is, not only --

4 THE COURT: Are you standing or have an
5 objection?

6 MS. FOX-YOUNG: I thought he was winding
7 up.

8 THE COURT: Well, we'll let you know when
9 he's wound up.

10 MS. BECK: Yeah.

11 The third is possession and control. And
12 this is after the notice is received.

13 So, again, we don't have evidence of notice
14 here, and we certainly don't have evidence of
15 possession and control after the notice was received.

16 THE COURT: Well, when you say "notice,"
17 you're certainly not saying that some defendant has
18 got to send notice, right? It's just notice in a
19 practical sense, right?

20 MS. BECK: I think -- I mean --

21 THE COURT: You could have a situation
22 where we're in a case, and somebody says, Hey, don't
23 destroy this evidence. I mean, that would be notice.
24 But I mean, back then, you still have a Trombetta or
25 Youngblood situation before lawyers are involved,

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1 or --

2 MS. BECK: I don't know the answer to that,
3 Your Honor.

4 In this case, in Bohl, the towers were in
5 existence when this litigation started. And the
6 lawyers and the defendants all -- and the company
7 made notice multiple times to preserve the towers
8 before they were taken down and destroyed.

9 So, in this case, they have notice from
10 lawyers and defendants before they were taken down
11 and destroyed.

12 The fourth category is -- and I can't even
13 read my handwriting there -- but, if we look at
14 Headnote 7, there is the evidence disposed of here
15 was central to the Government's case.

16 As I said -- and I think, as Your Honor
17 pointed out -- rightly so -- we would love to have
18 the walker here, because that would be, probably, our
19 best evidence against Mr. Perez.

20 But right now, central to the Government's
21 case is Mr. Perez' statements, and Mr. Rodriguez'
22 statements -- who is going to come in and say he saw
23 Mr. Perez giving his walker to be made into shanks.

24 The fifth, is that the Government --and
25 this is what Ms. Fox-Young alluded to -- the fifth

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1 category there is that the Government offers innocent
2 explanation for its failure to preserve. But it is a
3 little bit more nuanced. When the Tenth Circuit
4 looks at authority, it says it teaches that if the
5 government destroys or facilitates the disposition of
6 evidence, knowing of its potentially exculpatory
7 value, then we look to whether there might exist an
8 innocent explanation.

9 And so, in this case, the Government didn't
10 know -- still doesn't -- of any potentially
11 exculpatory value.

12 So that fifth category, is once we have
13 notice, once there is potential --

14 THE COURT: Well, I'll ask you the same
15 question I asked Ms. Fox-Young: If you were writing
16 my findings of fact, what would you put here? What
17 is the Government's explanation for how this
18 disappeared?

19 MS. BECK: The -- I think the evidence
20 would reflect that Warden Mulheron -- and I hope I'm
21 pronouncing his name right -- observed the walker, in
22 the Warden's office. I don't think he was the Warden
23 at the time.

24 He had photos taken of it, which photos
25 have been entered into evidence twice in this. And

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1 then we don't know. His testimony at that point was
2 that he believes that Officer Holguin took possession
3 of the walker. But I don't think Mr. Holguin
4 testified to that.

5 So, I wish I had a better answer for Your
6 Honor, but the answer is we don't know.

7 We know where it was on March 14, which is
8 in the Warden's office, and then after that, we don't
9 know. So there is no explanation here.

10 But no explanation may be negligence, at
11 best. It is certainly not bad faith under the
12 circumstances here.

13 Which gets me into where we started, and
14 then both departed from, which was the spoliation
15 sanction remedial jury instruction. I think the
16 Court is right that the Tenth Circuit has a higher
17 civil standard. I also have not seen any departure
18 from this in the criminal versus civil context.

19 But I think Youngblood, incorporating a bad
20 faith component to any sanction, to any due process
21 violation for destruction of evidence, likely, is the
22 same thing for remedial jury instructions. And I say
23 likely, intentionally, because the case from which --
24 I think Ms. Fox-Young cited to the Court -- said
25 that, if the Government likely destroyed or lost

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1 evidence that might have had exculpatory -- or excuse
2 me, that was likely exculpatory -- if the Government
3 destroyed or lost evidence that was, quote, "likely
4 exculpatory," that, quote, "might warrant a remedial
5 instruction."

6 And whether we looked to bad faith or
7 negligence, we don't have, number one, that this was
8 likely exculpatory. I think that all the evidence
9 shows that it was likely, if not totally inculpatory.
10 And even if we had that, that case says that it might
11 warrant a jury instruction.

12 In this case, if we look back at the
13 testimony; if we look back at Officer Holguin; if you
14 look back at Palomares -- but particularly Holguin --
15 he said: Mr. Perez came to me; he said they took the
16 piece out of my walker three to four weeks before
17 that. And I didn't have any reason not to believe
18 Mr. Perez.

19 And I think there are reasons Mr. Perez was
20 not targeted as one of the participants, number 1.

21 No one contends that he stabbed Mr. Molina.

22 Number 2, no one contends that he
23 manufactured the shanks that were used.

24 And he also -- there may be other reasons
25 that a targeted investigation into a murder by the

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1 limited resources of the State don't look to a wide
2 range of conspiracy, as maybe a VICAR or a RICO
3 prosecution by the United States would.

4 And so if -- although, the destruction of
5 the walker, in retrospect, isn't ideal, it's
6 understandable what happened. And if you could
7 not -- if you suppressed evidence, or even gave a
8 jury instruction because of lost or destroyed
9 inculpatory evidence that may have some exculpatory
10 value, there would be very few, if any, RICO
11 conspiracy prosecutions that happen afterwards.
12 Because, what happens in these types of cases -- and
13 what happened here -- is that, as we get evidence, as
14 we collect evidence, prosecute defendants; those
15 defendants cooperate with the United States, and more
16 evidence is collected -- which largely -- especially
17 in this case -- relies on only statements where
18 evidence is destroyed -- that happens. And that does
19 not support a basis for suppression of any evidence,
20 or a negative jury instruction.

21 I think -- and now I am wrapping up -- but
22 before I do, I think this motion included suppression
23 of paperwork. The same principle applies. Although,
24 in this case, I would say, if you look back at your
25 Harry decision, it also talks about in that case

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1 evidence that was never in the United States' 2 possession. It is a much higher bar for exclusion or 3 suppression.

4 And I think it may have been Officer
5 Holguin who testified about his interview of a CI
6 witness who said that Urquiza asked him what to do
7 with the paperwork. And he said: "Destroy it."

8 Mr. Urquiza destroyed it.

9 I think that establishes that the paperwork
10 was never in the Government's possession, and so it
11 was not destroyed by the Government.

12 But, again, if you look back at the Harry
13 case, in that case there were text messages that
14 allegedly were possessed by the United States, the
15 Court couldn't come up with any exculpatory value of
16 those. I would say the same thing about the
17 paperwork. I don't see how that could have been
18 exculpatory.

19 In the Harry case, the Court said that
20 those text messages likely came in under the Best
21 Evidence Rule. And I would submit to the Court that
22 that is the correct analysis here. When we talk
23 about the paperwork, it was never in the United
24 States' possession. There certainly wasn't bad faith
25 in its instruction on behalf of the Government. And

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1 any discussion about that in testimony at trial just
2 goes back to the Best Evidence Rule and the best
3 evidence would be those statements about it.

4 THE COURT: All right. Thank you, Mr.
5 Beck.

6 All right. Before I give Ms. Fox-Young the
7 last word on this motion, anyone want to say anything
8 on the defense side?

9 All right. Ms. Fox-Young.

10 MS. FOX-YOUNG: Your Honor, first, it
11 simply isn't true that there is a different standard
12 under the due process clause for RICO cases. I think
13 the Court, of course, knows that. The federal
14 government picked this case up, and they have to take
15 the evidence as they find it. And the standard
16 applies: Trombetta, Youngblood, and all the other
17 case law applies, just as it does to non-RICO cases.

18 With regard to the civil standard that the
19 Court is very familiar with, and the question of
20 notice, I would just -- and I think the Court
21 knows -- is familiar with all these cases, but I
22 would point the court to Baker 2012 Westlaw 12294413,
23 Tenth Circuit case. That's United States -- I'm
24 sorry, Tenth Circuit case from August 2012. The
25 Tenth Circuit talks about the duty to preserve

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1 evidence, which arises at the time that litigation is
2 imminent, the obligation to preserve evidence when
3 the party has notice that the evidence is relevant to
4 litigation, or when a party should have known that
5 the evidence may be relevant to future litigation.

6 The Browder case, which Judge Brack handled
7 in 2016, explores the law on spoliation, and includes
8 these Tenth Circuit cites.

9 I think it does inform the notice inquiry.
10 And there is no question, in March of 2014, that the
11 Corrections Department, State Police are on notice,
12 to the extent the civil standard applies, are on
13 notice that this is going to pertain to a criminal
14 case.

15 So the Government's argument that the
16 defense has some burden to inform the Government that
17 they shouldn't destroy evidence, I think, is
18 unavailing.

19 And the Court pointed out that we're well
20 after the fact. There certainly are cases, and Mr.
21 Beck explored them, where the Government is on actual
22 notice from a defense attorney. But this is apparent
23 notice. I think the Court can find that they should
24 have known that litigation was imminent; that a
25 criminal case was imminent.

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1 I would like to draw the Court's attention
2 to some additional testimony from last week, and the
3 parties have agreed that it's incorporated into this
4 hearing. Agent Stemo testified about Mario
5 Rodriguez' debrief. And in short, in summary, Mario
6 Rodriguez described Mr. Perez as scared when he came
7 in, when Mr. Rodriguez came in to the cell, and
8 basically stated that Mr. Perez didn't want to be
9 otherwise involved. He appeared scared, and he made
10 some statements that he didn't want be hurt. And
11 then Mario Rodriguez went on at some length about
12 that.

13 And so we'd ask the Court to consider this
14 is not an open-and-shut case, where -- I know that
15 the Court has said the fact that a lot of evidence
16 points to a missing piece from the walker is very
17 significant and material. Nobody knows where those
18 shanks came from. And that's what makes this
19 evidence so important.

20 Mr. Perez himself, in the subsequent
21 statements made to an informant that are the subject
22 of a separate suppression motion that the Court will
23 hear, Mr. Perez doesn't know what was ultimately used
24 to kill Javier Molina. And if it didn't come from
25 his walker, he's innocent.

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1 And so the Government likes to say because
2 he made these subsequent statements, that's why he
3 was charged, we absolutely know what happened. The
4 Government's own witnesses don't know what happened,
5 they don't know where the shanks came from, and that
6 is precisely why it would be so useful, so critical,
7 and we argue of an exculpatory nature, to examine the
8 walker.

9 The Court will recall that Agent Acee, with
10 regard to those statements -- I'm not going to get
11 into this in any great detail because we are going to
12 argue this on the other suppression motion -- but
13 Agent Acee testified that people do take credit for
14 things that they didn't do. The Court will hear some
15 of the other reasons for that on our other motion.

16 But, as the Court continues to point to
17 what's relevant, is what was known in 2014 about the
18 importance of this walker. And I think Mr. Beck
19 conceded that, to some degree. With all due respect,
20 the Government can say all day that they'd like to
21 have the walker here today; that that would be
22 preferable. But, in fact, I think they're in a much
23 more advantageous position just being able to rely on
24 grainy photographs, without scale, and to be able to
25 get up and say to the jury and to the Court: We can

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1 demonstrate a perfect fit. And they have done that
2 in open court. They have done it in the pleadings.

3 That is precisely what we are asking the
4 Court to suppress and to not allow, because the
5 defense cannot counter that. We don't have the
6 actual walker to compare. We have a bunch of murky
7 testimony about what wasn't done. And people don't
8 know what happened to it. But when the Government
9 gets up and argues: It's a perfect fit, we know it
10 came from his walker for all these reasons, that is
11 the linch pin of their case; that is what makes this
12 so material; and that is why I think the Court has to
13 consider, under Bohl and the Bohl factors, that it
14 goes directly to Mr. Perez' defense.

15 And so, if the Court is inclined to make
16 any ruling as to where the Government can and can't
17 go, we would ask the Court to not allow the
18 Government to make statements that there would have
19 been a perfect fit, when there is no evidence to
20 support it, and, of course, to suppress these grainy
21 photographs, other evidence of the walker, and
22 testimony as to any way that anybody can represent
23 that it is the source of the murder weapon in this
24 case.

25 And I have nothing further unless the Court

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1 has any questions.

2 THE COURT: I don't. Thank you,
3 Ms. Fox-Young.

4 Well, as I said in the Harry case, under
5 the two-prong Trombettta test, the Government violates
6 a defendant's right to due process when it destroys
7 evidence whose exculpatory significance is apparent
8 before destruction. I will give some further thought
9 to my analogy that I've been using, but I still think
10 that it's useful, that if we had the walker here
11 today, its exculpatory significance would not be
12 apparent even today. You have to draw some other
13 inferences, and have some other evidence before it's
14 available. And so it doesn't meet Trombettta
15 standard. So I think it fails on its exculpatory
16 significance being apparent, and that there is no
17 evidence here that anybody thought it being
18 exculpatory at the time.

19 So I think that we are dealing with a
20 Youngblood situation. And looking at the test in
21 Bohl that Judge Ebel wrote, again, he repeated the
22 Trombettta standard, but then he added that in
23 Youngblood, Trombettta was extended; that the
24 exculpatory value of the evidence is indeterminate,
25 and all that can be confirmed is that the evidence

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1 was potentially useful for the defense, then
2 defendant must show that the Government acted in bad
3 faith in destroying the evidence. Youngblood tells
4 us why they have this bad faith standard, why it's
5 not just negligence, or why Trombettta is not the
6 standard to use. The Supreme Court in Youngblood
7 stated that part of the reason for the difference in
8 treatment is found in the observation of Trombettta,
9 that, quote, "Whenever potentially exculpatory
10 evidence is permanently lost, the Court faces the
11 treacherous task of divining the import of materials
12 whose contents are unknown and very often disputed.
13 Part of it stems from our unwillingness to read the
14 fundamental fairness requirement of the due process
15 clause. And Lisenba versus California, as imposing
16 on police and undifferentiated duty to retain and
17 preserve all material that might be of conceivable
18 evidentiary significance in a particular
19 prosecution." The Supreme Court continued, "We think
20 that requiring a defendant to show bad faith on the
21 part of the police both limits the extent of the
22 police's obligation to preserve evidence to
23 reasonable bounds, and confines it to that class of
24 cases where the interests of justice most clearly
25 require it; i.e., those cases in which the police

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1 themselves, by their conduct, indicate that the
2 evidence could form a basis for exonerating the
3 defendant. We, therefore, hold that unless a
4 criminal defendant can show bad faith on the part of
5 the police, failure to preserve potentially useful
6 evidence does not constitute a denial of due process
7 of law."

8 I don't think I'll be able to find from the
9 evidence that's been presented over the last two days
10 any bad faith. I think the Government has conceded
11 negligence. I think Ms. Schile's testimony would
12 confirm that. But that's about as far as it rises.
13 It just doesn't look like it was the most thorough
14 investigation. And, obviously, the United States has
15 been more thorough in uncovering some evidence at
16 this point for an additional defendant.

17 So I'm inclined to rule that this case does
18 not fall within Trombetta because the evidence, even
19 if it was here, would not be apparently exculpatory.
20 It's a Youngblood situation. And the defendant has
21 not proven that the state officials at the time acted
22 in bad faith. As far as the notes, I just don't
23 think they were ever in the possession of the
24 Government, so it's not a situation where the
25 Government can be blamed for not having those notes.

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1 So if this is a motion that the defendant
2 or defendants would like me to take a closer look at,
3 I'd be inclined to do so. Otherwise, barreling
4 toward trial, that will have to be my ruling is that
5 I'm not going to suppress any evidence as a result of
6 this motion.

7 All right.

8 MS. FOX-YOUNG: Your Honor?

9 THE COURT: Yes.

10 MS. FOX-YOUNG: Just one quick cleanup
11 item.

12 Mr. Beck informed me that -- and I don't
13 want to misstate the Government's position, but I
14 think they're willing to file -- I don't remember the
15 exhibit number, but Mr. Holguin's investigative file
16 under seal. I think it's Exhibit OO. And I would
17 just like to get that done before the day is over.
18 And then they're going to go ahead and do the
19 redactions, figure out what's not relevant, and
20 provide it in discovery. But we want to get that
21 done while we're here today.

22 THE COURT: All right. Is that where you
23 are, Mr. Beck?

24 MS. BECK: That's correct, Your Honor.

25 THE COURT: All right. So I will so order.

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1 All right. Ms. Fox-Young, do you and Mr.
2 Villa have your next motion to suppress?

3 MR. VILLA: Yes, Your Honor. This is the
4 motion to suppress concerning the statements
5 allegedly made by Mr. Perez to Billy Cordova, so I
6 believe the burden is on the Government to proceed.
7 And I think they have intended to put on some
8 witnesses, but I don't want to speak for them.

9 THE COURT: Do you wish to make any opening
10 statement?

11 MS. ARMIJO: Your Honor --

12 MR. VILLA: I'll hear from Ms. Armijo, but
13 yes, I can give an opening.

14 MS. ARMIJO: Your Honor, this is the motion
15 that I had talked about this morning with Mr. Roark;
16 that he was going to be our first witness to testify,
17 and probably more to the point on a lot of the
18 issues. He was supposed to come down yesterday, and
19 did not because of the snow and icy roads. I asked
20 him to come down this morning, but he did not come
21 down this morning, presumably for the same reasons,
22 for icy roads. However, he will be here Tuesday.

23 We were trying to possibly get another
24 witness in his place, but didn't realize till the
25 noon hour that that person did not have the same

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1 knowledge that Mr. Roark has.

2 So with that, Billy Cordova -- his attorney
3 is not available till next week. We would propose to
4 start -- to finish the James hearing at this time,
5 and then go ahead and start the motions to suppress
6 with all of the witnesses next week.

7 THE COURT: Any thoughts?

8 MR. VILLA: Your Honor, I think that's
9 fine. I'll consult with Ms. Fox-Young real quick,
10 and maybe Ms. Bhalla, because so that the Court knows
11 we really want the Court to consider 1294 and 1295,
12 the two motions to suppress together.

13 THE COURT: All right.

14 MR. VILLA: But I don't think that's a
15 problem. That would be fine, Your Honor.

16 THE COURT: Let me ask Ms. Armijo, are
17 there any witness problems here? I mean, it's not
18 snowing in Albuquerque. I had to drive back here. I
19 didn't know there was any bad weather. Where is the
20 bad weather?

21 MS. ARMIJO: Your Honor, I'm telling you
22 what he indicated to me last night, and -- that there
23 were icy roads. I don't think there is any snow now.
24 I had asked him to drive this morning, and to provide
25 a reason why he did not drive this morning, and I

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1 have not gotten that reason. All I know is that he
2 had last told me that there were icy roads. And he
3 is in Santa Fe, Your Honor. He's not in Albuquerque,
4 he is in Santa Fe.

5 THE COURT: All right. We'll then take
6 up -- anybody have a problem with that?

7 MS. SIRIGNANO: Your Honor, I do. This is
8 Amy Sirignano for the record. And just for the
9 record, because I'm trying to get along here and move
10 this along as quickly as possible, I live in Santa Fe
11 right now. And yes, there was some snow yesterday.
12 But I was on a telephonic hearing this morning with
13 Judge Attrep in Santa Fe, and there was no issue at
14 all with the roads this morning. Last night it was a
15 little bit problematic, in the afternoon. But, as
16 you know, in Santa Fe, it melts the same day. We
17 also have a witness here, who spoke to her mother,
18 and the roads were -- this morning -- the roads were
19 fine from Chama to Santa Fe.

20 The only real issue that I have about this,
21 Judge, is that if we proceed to the James hearing, I
22 anticipate that they're going to put on statements
23 regarding my client, Mr. Garcia, and Mr. Baca,
24 because we requested this James hearing. And I have
25 spent a significant amount of time, me,

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1 Ms. Harbour-Valdez, Ms. Wild, and the Government --
2 specifically, hours trying to get an order on this.
3 And I asked the Government in an email if they
4 subpoenaed their witness. And I never got a
5 response. We have an obligation, if we make an
6 agreement with opposing counsel, the Court, the
7 Court's representative, that they're going to have
8 evidence on the day that we all scheduled it, to make
9 sure that we know that this isn't going to happen;
10 not, you know, at noon, during the lunch hour, or
11 with the Court at 2:30, but to let us all know, so we
12 can shift gears, if we need to, to take up something
13 else, Your Honor. And so I just want the Court to
14 know that I'm trying not to make a big deal about
15 this, but the reasons of this change are really
16 suspect. And I'd like to know if these witnesses
17 were subpoenaed, after we all made this arrangement
18 among the parties to be here today.

19 Thank you, Judge.

20 THE COURT: Were they under subpoena?

21 MS. ARMIJO: Mr. Roark was not under
22 subpoena. But he was going to be here, planning to
23 be here, and we spoke to him about it. Given his
24 position with the Department of Corrections, I don't
25 think he is trying to avoid being down here. He is

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1 cooperative. And so we had no reason to believe that
2 he had to be subpoenaed. I certainly will subpoena
3 him for next week. But there really was no reason to
4 believe that he would not be here.

5 As to the James hearing, I believe Mr.
6 Castellano was just about finished. I think he only
7 has one more statement to go over, and then it was
8 just going to be cross-examination.

9 THE COURT: All right. Well, I think the
10 best we can do is work on the James hearing. And I
11 always knew that was going to be the fumes here; that
12 if we got through with all the suppression, we were
13 going to go back to the James hearing. So 2:30
14 Friday afternoon, let's try to finish up, or make
15 some progress on the James hearing.

16 MR. VILLA: Your Honor, just to perhaps
17 save us a little bit of work this weekend, the
18 Government and I have -- Ms. Armijo and I have
19 discussed which witnesses they're going to be
20 calling. It sounds like they are going to call Billy
21 Cordova. The previous exchanges we had with each
22 other were sort of, if necessary. If we need to do a
23 writ, we'll do a writ, we'll get him down here
24 ourselves. But if Ms. Armijo is planning to have him
25 here, then we'll save a little bit of time in

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1 preparing that and having the Court prepare a writ.

2 MS. ARMIJO: I believe he will be here.

3 Well, he'll be in Southern New Mexico, yes.

4 MR. VILLA: I just want to see if we're off
5 the hook on getting a writ. He'll be in court.

6 MS. ARMIJO: He will be available to both
7 parties.

8 MR. VILLA: Thank you. Is that okay,
9 Judge?

10 THE COURT: That's fine. You're going to
11 make him available; is that what you're saying, Ms.
12 Armijo?

13 MS. ARMIJO: Yes, Your Honor. We've
14 requested him to be moved.

15 THE COURT: He'll be in the building.

16 MS. ARMIJO: We have to make arrangements
17 with the US Marshals to have him in the actual
18 building, but yes.

19 MR. VILLA: You'll do that, I don't need to
20 prepare the writ?

21 MS. ARMIJO: Yes.

22 THE COURT: That's what he is trying to
23 find out, if he needs to prepare any paperwork for me
24 to get him here.

25 MS. ARMIJO: And I don't want to make any

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1 promises where he is, because obviously his safety is
2 an issue, and I don't want to say that in open court.

3 THE COURT: I understand. But Mr. Villa
4 doesn't need to prepare any paperwork for me to order
5 that he be here.

6 MS. ARMIJO: No, you do not.

7 MR. VILLA: Thank you.

8 MS. ARMIJO: And if there is anybody
9 else -- I think we were working together last weekend
10 to try and streamline things -- if there is anybody
11 else that he or Ms. Bhalla needs, that we can try to
12 streamline things, and we'll be working over the
13 weekend to do that.

14 MR. VILLA: Thank you.

15 THE COURT: All right. Ms. Bhalla?

16 MS. BHALLA: I can speak with Ms. Armijo
17 after the hearing.

18 THE COURT: All right. Ms. Armijo.

19 MS. ARMIJO: Your Honor, I believe we just
20 have another housekeeping matter to take care of,
21 that Mr. Beck will take care of, and I'll try to take
22 it up before we start, if there is anything else.

23 But I do know we want to put something on the record.

24 THE COURT: All right. Mr. Beck.

25 MS. BECK: I wish I knew how to do this

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1 better, but unfortunately I don't. I'm going to work
2 as best I can here. It was brought to our attention
3 today that there, at some point, was a request for
4 compensation to specific individuals in this case.
5 And so we disclosed what starts at Bates No. 30709
6 and goes to Bates number 30714, a list of persons who
7 the defense asked us for compensation. At the bottom
8 there are three names: Manuel Armijo, Richard
9 Gallegos, and Santos Gonzalez, for whom there isn't a
10 CHS number, and for whom there isn't a code name, no
11 payments provided. That indicates that they are not
12 cooperators in this case. Their names -- and the
13 defense specifically requested their compensation,
14 and so we answered the defendants' request. But we
15 don't want to create any impression that these folks
16 are cooperating with the Government for obvious
17 reasons. So we just wanted to make that perfectly
18 clear, that it was brought up to us that there may be
19 some confusion in this document. But that's why they
20 don't have CHS numbers. They're not signed up with
21 the FBI. Thank you. I misspoke. So Manuel Armijo
22 and Richard Gallegos do not have CHS numbers, and
23 Santos Gonzalez is not cooperating in any capacity.
24 I should have made that clear.

25 THE COURT: All right. Directing your

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1 questions to the Court, any defense lawyers have
2 questions you want me to ask Mr. Beck about what he
3 just said?

4 All right. Mr. Lowry?

5 MR. LOWRY: Your Honor, only to the sense
6 that in the Brady-Giglio materials that we talked
7 about at the last hearing. I appreciate the
8 Government disclosing the total amounts. But what we
9 had really anticipated seeing are the individual
10 receipts, individualized payments that were made.
11 They're important to us. As we recall from our
12 motion to compel, we had asked information related to
13 Grace Duran. We believe that some of these receipts
14 were probably signed by Ms. Duran on Eric Duran's
15 behalf. And understanding the timing and the amount
16 and the nature of individualized payments would be
17 very critical for us to understand. And we haven't
18 been able to -- I've asked opposing counsel for that.
19 I don't think we've had explicit agreement to get
20 that material to date. And I would just like the
21 Court's assistance here in making sure that we get
22 that in as timely a manner as possible. Thank you.

23 MS. ARMIJO: They were turned over as to
24 Mr. Duran, which is what he was requesting.
25 Typically, they were turned over today to our office

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1 to go out in the next set of discovery. But we do
2 have them and we will provide them.

3 THE COURT: Do you know when that next set
4 is going out?

5 MS. ARMIJO: We can probably get a
6 condensed set out possibly Monday to Mr. Aoki.

7 THE COURT: All right. Does that work,
8 then, for you, Mr. Lowry?

9 MR. LOWRY: In the bigger picture it does,
10 Your Honor, but if I remember correctly from
11 yesterday, I think I owe the Court a brief. And if
12 the United States would be so kind as to send me the
13 confidential human source or confidential informant
14 contracts to assist me with my brief writing over the
15 weekend, I'd greatly appreciate it, Your Honor.

16 THE COURT: Can that be done?

17 MS. ARMIJO: I don't know off the top of my
18 head -- because I don't have them here -- if it has
19 information that needs to be redacted. I know that
20 our office requires us to do it over USAFX, which I
21 don't know how to do. And if I can figure out a way
22 to do it, I will.

23 THE COURT: Can you just delay filing your
24 brief, Mr. Lowry?

25 MR. LOWRY: You just read my mind, Your

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1 Honor.

2 THE COURT: All right. So do you want to
3 just do that then?

4 MR. LOWRY: That's fine.

5 THE COURT: Because it sounds like you're
6 going to get this information maybe as early as
7 Monday.

8 All right. Mr. Castellano?

9 MR. CASTELLANO: Yes, Your Honor. We will
10 re-call Special Agent Acee.

11 THE COURT: Mr. Acee, I'll remind you
12 you're still under oath for the purposes of the James
13 hearing.

14 Mr. Castellano, if you wish to continue
15 your direct examination of Mr. Acee.

16 MR. CASTELLANO: Yes, sir, thank you.

17 BRYAN ACEE,

18 after having been previously duly sworn under oath
19 was questioned and testified further as follows:

20 DIRECT EXAMINATION

21 BY MR. CASTELLANO:

22 Q. Just to get us up to speed, Agent Acee,
23 when we were here last time, we were discussing
24 Government's Exhibit's 26, and that's Christopher
25 Garcia Bates stamp 1085. Do you recall that?

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1 A. I do.

2 Q. And do you remember what the nature of this
3 conversation or interaction dealt with?

4 A. Yes. This conversation was between Mario
5 Montoya, the confidential human source, and Chris
6 Garcia. They are at Garcia's house as this is taking
7 place and being recorded.

8 Q. What was the purpose of the meeting?

9 A. Mario Montoya went to Garcia's house to
10 pick up firearms; in this case just one, to be used
11 on the hit on Gregg Marcantel.

12 Q. Okay. I'm going to go ahead -- and we've
13 covered some other parts of the conversation, so I'll
14 move to Bates stamp 1095 on that transcript. I'll
15 start here with the highlighted portion, where the
16 CHS says, "I'm going to put this away and Imma come
17 back." Can you tell us what's going on there?

18 A. The CHS has received a .22 caliber pistol
19 from Garcia, and he's telling him that he's going to
20 go put it away, and that he'll come back to the house
21 afterward.

22 Q. Okay. Then tell us about the rest of the
23 conversation.

24 A. Mr. Garcia brings up "Chuco," who is Mandel
25 Parker. Do you want me to read from this, or just

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1 tell you what I know of it?

2 Q. Yes, tell us what the rest of the
3 conversation means in the context of this page.

4 A. Sure. So Mr. Garcia says, "Then with
5 'Chuco' too he has to be, like you said, right after
6 we take him, if he looks" -- unintelligible. Both
7 are speaking at the same time, there is overlap --
8 "take it all." Garcia says, "At all just right
9 there. Even if he has to take him to the fucking
10 thing and get him and put the thing on him. The
11 weapon on him, and leave it on, leave it there. A la
12 verga. It's fucked up, but if he -- if he right away
13 gets out and says, What's up fool."

14 Montoya says, "I'm gonna say nothing. He's
15 not gonna say nothing. You're gonna get down and do
16 it and that's it. I mean" -- unintelligible -- "do
17 it. I'm going to do it."

18 Garcia says, "Yeah."

19 Montoya says, "I'll do it and then I'll do
20 him right after, know what I mean. I already, I
21 already pretty much got" -- unintelligible -- "good."

22 Q. Let me stop there. What's going on in the
23 context of that conversation?

24 A. Garcia is expressing some doubts about
25 "Chuco," Mandel Parker, who had previously agreed to

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1 help Mario Montoya kill Marcantel and Santistevan.
2 And what they're discussing is "Chuco," or Mandel
3 Parker, might be a weak link. If he gets picked up,
4 he might tell. So that they're discussing killing
5 Parker, and leaving all the evidence, to include the
6 murder weapon, with Parker.

7 Q. So was it your understanding from the
8 operation that Mr. Baca, Mr. Garcia, and Mr. Parker
9 had agreed to kill Secretary Marcantel?

10 A. Yes.

11 Q. Okay. I'm turning to the next page. It's
12 Bates stamped 1096. And I want to focus on the last
13 statement highlighted on the page, which is
14 Mr. Garcia's.

15 A. Garcia says, "Give him a hotshot, you know,
16 whatever. But hey, just tell him, yeah, fucking a,
17 my only chance, let me put in some jale for you. I
18 told him."

19 Q. What was your understanding of the
20 discussion about the hotshot?

21 A. Garcia is suggesting to the CHS, Mario
22 Montoya, that he give Mandel Parker a hotshot, which
23 is a fatal dose of heroin.

24 MR. CASTELLANO: Your Honor, just so the
25 Court knows, for the record, the next statements are

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1 attributable to Rudy Perez, and so I'll note for the
2 record that these are the subject of the motion to
3 suppress, this set here.

4 THE COURT: Okay.

5 MR. CASTELLANO: I'm going to bring them in
6 to the Court's attention, like we did last week. So
7 last week the Court heard evidence related to
8 Government's Exhibit 16, so I won't cover that today.
9 I believe that was already covered. Okay. I'm
10 turning to the record. This is DeLeon Bates stamp
11 20540. And for the record, this is a marked-up
12 transcript. The transcripts, once introduced, will
13 be clean transcripts. But this is for ease of
14 focusing the testimony.

15 Q. Okay. I want to turn attention to a
16 statement here by Rudy Perez referring to "Crocodile"
17 answering for it and BB answering for it. Do you see
18 that portion?

19 A. Yes.

20 Q. Can you tell us basically what the
21 statement is and who was involved in the statement?

22 A. Do you want me to read it first, or just --

23 Q. Go ahead and read it, and then put it into
24 context, please.

25 A. Rudy Perez says, "Yeah, and you know, check

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1 this out, a, and it's like what was discussed.
2 'Crocodile' about has to answer for it. BB has to
3 answer for it, um, I think there is four or five that
4 have to answer. Why it was never done the first the
5 paperwork got sent down."

6 Q. Do you know what that is a discussion
7 about?

8 A. Yes.

9 Q. What is it?

10 A. Mr. Perez is talking about the prior times
11 the paperwork for Javier Molina was sent down to
12 Southern. "Crocodile" is an SNM member who was in
13 charge of the pod; I don't remember his name. BB was
14 another SNM member in charge of the pod down there.
15 That's Javier Rubio. And they're going to have to
16 answer for the fact that paperwork went down and
17 Molina wasn't hit.

18 Q. And who is that statement attributed to?
19 I'm going to draw your attention to the next portion
20 there.

21 A. Mr. Perez is saying, "I, I heard 'Pup' say
22 they have to answer for that no matter how close I am
23 to them."

24 Q. Okay. And so what type of conspiracy are
25 we talking about when it comes to the paperwork and

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1 "Pup," or Mr. Baca saying people have to be
2 responsible?

3 A. There was an expectation that when the
4 paperwork was produced, the other members of the gang
5 would act on it. They didn't. And in this statement
6 Mr. Perez is saying that he heard from "Pup," Anthony
7 Baca, that they would have to answer for it.

8 Q. And is that because from the investigation
9 you've learned that the paperwork went down
10 previously, but the murder was not committed?

11 A. Yes.

12 Q. The next statement is from DeLeon Bates
13 stamp 20544. I'm going to direct your attention now
14 to more discussion about paperwork. Who is making
15 the statement this time?

16 A. Mr. Perez.

17 Q. And what is the statement as it relates to
18 paperwork?

19 A. Within that statement he's saying, quote,
20 "He's got the paperwork a year before. That's when
21 he told me, hey, we got it. Yes, but we're not gonna
22 show it. So you just make sure you show some love,
23 no?"

24 Q. Okay. And then continue.

25 A. The CHS says, "Orale, so hey, that's -- so

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1 that's why -- so that's why that fool Javi, Javier
2 was fucking always sending coffee to him because he
3 knew he was a chaffa fucker."

4 Perez says, "He was. He was covering his
5 ass, dog."

6 Q. Can you tell the Court whether that was a
7 further discussion of the paperwork that was
8 discussed just a minute ago in your testimony?

9 A. Yes, I believe it is.

10 Q. And for purposes of context, are you
11 familiar with the word "chaffa" that's on that page?

12 A. Yes.

13 Q. What does that generally refer to?

14 A. They're no good.

15 Q. I'm drawing your attention to DeLeon Bates
16 stamp 20555. And I want to talk to you once again
17 about discussions about paperwork.

18 A. I'll start where you pointed, or --

19 Q. Yes.

20 A. So the CHS is asking, "So that's what it
21 was, it was the paperwork on Jesse Sosa."

22 Mr. Perez responds, "That, that, that, that
23 was part of it, and then Archie's boy was the other
24 half."

25 Q. And I'll show you right here. Tell us what

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1 Mr. Perez says about his discussions with others.

2 A. Toward the bottom of his statement, Mr.
3 Perez says, "I told them vatos not like" --
4 unintelligible -- "think about that, and they
5 basically told me, you know what, a this is going to
6 happen regardless, just stay out of it."

7 Q. Now, what's your understanding of the
8 context of this statement? Stay out of what?

9 A. The Molina hit.

10 Q. And was it your understanding from the
11 investigation that there was a conspiracy to murder
12 Javier Molina?

13 A. Yes.

14 Q. And once again, DeLeon 20557. I'm going to
15 direct your attention here to a statement by Mr.
16 Perez.

17 A. Mr. Perez is saying, "You feel me? Like I
18 say, they told me to shut up and just stay out of it,
19 and they did what they wanted to do. Then later on,
20 suicide mission was there."

21 Q. And what's the discussion about the pieces?

22 A. CHS asked Mr. Perez, "So why did you give
23 them pieces, carnal?"

24 Q. Okay. Continue on down the page with the
25 discussion, and tell us who was making each statement

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1 here.

2 A. They continue talking about the pieces, and
3 Mr. Perez says, "I just, I just get out of it, let
4 them do their own thing. I was nobody, I just, fuck
5 it."

6 The source says, "Yeah, but they fucking
7 got them" -- unintelligible -- "from your fucking,
8 from your walker, carnal. Could have gotten you
9 caught up, you know what I'm saying?"

10 Mr. Perez says, "Oh, it did, it did. Look
11 where I'm at."

12 Q. Let me take you down the page here to Mr.
13 Perez' explanation.

14 A. Mr. Perez says, "I just got out of the
15 hold" -- I believe that's a mistake; it should be
16 hole -- "I was real sick. So for me to actually
17 participate in doing some dirt" -- unintelligible --
18 "physically I wasn't able to. But we all have to do
19 our part."

20 Q. Continue with that statement, please.

21 A. "But we all have to do our part, you know
22 what I mean? One way or another, homes, everybody
23 has to put their part. Do you feel me?"

24 Q. Now, taking you back to the pieces. What
25 is that a discussion of?

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1 A. The shanks.

2 Q. From where?

3 A. Mr. Perez' walker.

4 Q. And can you put it in the context of him
5 saying he has to do his part?

6 A. He just got done describing that he got out
7 of the hole. He was sick. He physically wasn't able
8 to do his part. But he was, by providing the metal
9 that were fashioned into shanks to do the hit.

10 Q. Turning your attention to DeLeon Bates
11 stamp 20558, and I want to draw your attention to the
12 top of the page here, where it says, "The old man was
13 pissed." Can you tell us who made that statement?

14 A. Mr. Perez made that statement.

15 Q. Okay. Please continue reading the
16 statement and we'll put it into context.

17 A. "The old man was pissed, bro, he was like,
18 he, he, he, he was upset with them, the other fools
19 over there. They -- why didn't they handle it a year
20 sooner when the" -- unintelligible -- "took the
21 paperwork over there. Well you send the paperwork up
22 there."

23 Q. Okay, continue.

24 A. CHS asks "Who?"

25 Mr. Perez says, "Who?"

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1 CHS says, "Spider."

2 Mr. Perez says, "Yeah."

3 Q. Continue.

4 A. Source says, "Yeah, I already know."

5 Mr. Perez: "And, and, and see, that was
6 something that he was going to have to handle when he
7 got over there, a."

8 CHS asks: "Who, 'Spider'?"

9 Mr. Perez says, "Yup, they told him you
10 send the fucking" -- unintelligible -- "over there
11 and find out why the fuck it wasn't taken care of."

12 The CHS asked: "Is that what 'Pup' told
13 him?"

14 Mr. Perez says: "Huh?"

15 CHS asked: "Is that what 'Pup' told him?"

16 Mr. Perez says: "I know somebody told him.
17 I don't know who exactly but I knew, I knew" --

18 The CHS asks: "What did 'Pup' say, because
19 what did 'Pup' say because the" -- unintelligible --
20 "wasn't done earlier?"

21 Mr. Perez responds: "He, he didn't like
22 it."

23 Q. Let me stop you there. First of all, there
24 is mention of "Spider" here. Do you know who
25 "Spider" is?

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1 A. That's David Calbert.

2 Q. And do you know what "Spider"'s role was in
3 the Molina murder?

4 A. Mr. Calbert passed the paperwork, in this
5 case, two pages from an LCPD police report, that
6 indicated Molina gave a statement to the police and
7 cooperated. Mr. Calbert took that from the Level 6
8 at PNM to the Level 5 at PNM and gave it to Lupe
9 Urquiza, "Marijuana."

10 Q. What was the purpose of moving the
11 paperwork?

12 A. Urquiza and Varela -- Mauricio Varela --
13 were scheduled to be transported down to the Southern
14 New Mexico Correctional Facility. So they were
15 passing paperwork to eventually make it down to
16 Southern, where Molina was.

17 Q. For what purpose?

18 A. To provide the paperwork so Molina could be
19 hit.

20 Q. So when there is a discussion about the
21 "old man" on top, and then "Pup," who is that
22 referring to?

23 A. One and the same, Mr. Baca.

24 Q. So is it an indication that Mr. Baca was
25 not happy that the hit had not been taken care of

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1 earlier?

2 A. Yes.

3 MR. CASTELLANO: Your Honor, I pass the
4 witness.

5 THE COURT: All right. Thank you, Mr.
6 Castellano. Let's do this: Let's take our break
7 before we start cross-examination. I think it would
8 be a good time for us to do that. So we'll be in
9 recess for about 15 minutes.

10 (The Court stood in recess.)

11 THE COURT: All right. Looks like
12 everybody has counsel. So let's go back on the
13 record. Look around, make sure everybody has got
14 counsel.

15 I understand that Ms. Fox-Young has left,
16 and she's now going to join us by phone. Are you
17 there, Ms. Fox-Young? Not yet.

18 All right. Ms. Schile has left us.

19 And Ms. Jacks, you're going to leave at
20 4:00; is that correct?

21 MS. JACKS: I may. We'll see how things
22 are going.

23 THE COURT: All right. Be safe.

24 There has been some inquiries about Monday
25 or Tuesday. My understanding is that we're starting

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1 at 1:00 o'clock on Monday. So I think if you look at
2 CM/ECF, I think it shows that. So that's my
3 understanding. Ms. Wild had a death in her family
4 this morning, so she's en route to north Texas now.
5 She's a little bit out of pocket. But CM/ECF says
6 1:00. I thought it was 1:30. But it looks like it's
7 1:00. But I'm planning on being here on Monday, and
8 I'd like for you to join me.

9 MR. BLACKBURN: Is that an invitation?

10 THE COURT: No, that's a court order. I
11 don't want there to be an ambiguity. It's a court
12 order.

13 MS. ARMIJO: And Your Honor, Ms. Wild knew
14 this when we scheduled that, I will be in trial. But
15 Mr. Castellano and Mr. Beck will be sure to carry on
16 without me.

17 THE COURT: Okay. Mr. Acee, you're back on
18 the stand. I remind you you're still under oath.

19 It looked like Ms. Fox-Young was going to
20 be the one to get up, and she's gone. So who is
21 going to lead off?

22 MR. VILLA: Your Honor, it was actually
23 going to be me for my team, but I'm happy to defer to
24 my co-counsel to start first, Ms. Jacks.

25 THE COURT: Do you want to go first,

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1 Ms. Jacks?

2 MS. JACKS: I would like to, if I might.

3 THE COURT: All right. Ms. Jacks.

4 MS. JACKS: And I won't be long.

5 EXAMINATION

6 BY MS. JACKS:

7 Q. Good afternoon, Agent Acee.

8 A. Good afternoon.

9 Q. So last week you testified about some
10 conversations or some statements made by Mr. Baca and
11 Mr. Garcia that were the subject of recordings;
12 correct?

13 A. Yes.

14 Q. And then you added to that this afternoon
15 with one additional or some additional recorded
16 statements by Mr. Garcia; is that right?

17 A. Yes.

18 Q. And those statements are being offered, I
19 guess as -- or being proffered as coconspirator
20 statements relating to the conspiracy to kill
21 Corrections Secretary Marcantel and STIU Chief
22 Santistevan?

23 A. Yes.

24 Q. Mr. Sanchez wasn't involved in any
25 conversations regarding those crimes, was he?

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1 A. He was not.

2 Q. In fact, he's not charged with those
3 crimes, is he?

4 A. No.

5 Q. So if there is a conspiracy to kill
6 Marcantel or Santistevan, Mr. Sanchez is not a part
7 of it, not even alleged to be a part of it?

8 A. Not that I'm aware of.

9 Q. Now, I want to ask you a few questions
10 about the statements you testified to this afternoon
11 regarding Rudy Perez.

12 A. Okay.

13 Q. And you referenced a transcript which is
14 Government's Exhibit 16. Is that a transcript of a
15 recording?

16 A. Yes.

17 Q. And it's a recording that was made by who?

18 A. Billy Cordova.

19 Q. And Billy Cordova is one of the
20 Government's cooperators in this case?

21 A. He is.

22 Q. And do you know -- how did he make that
23 recording?

24 A. With what I'll call a body wire, or I think
25 in the past in these hearings we've been calling them

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1 an ELSUR device, which stands for electronic
2 surveillance.

3 Q. Okay. So some sort of electronic
4 surveillance device?

5 A. Yes.

6 Q. And where was Mr. Cordova and Mr. Perez at
7 the time those recordings were made?

8 A. They were at the Penitentiary of New
9 Mexico. And I believe they were at the Level 6 or
10 the north facility.

11 Q. And were they housed in adjacent cells?

12 A. Yes.

13 Q. What was the date of the statements that
14 you testified about this afternoon?

15 A. I don't have the exact date, but it took
16 place in February of 2016.

17 Q. So almost two full years after the homicide
18 of Mr. Molina?

19 A. Yes.

20 Q. And with respect to the statements that
21 Rudy Perez made regarding paperwork, do you know
22 whether that was something that Rudy Perez had
23 personal knowledge of, or whether he was relaying
24 something that was told to him by someone else?

25 A. My interpretation of listening to the

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1 conversation and reading the transcripts is that he
2 had quite a bit of knowledge about it. I'm not
3 sure --

4 Q. Well, my question was: Do you know? It
5 wasn't what your interpretation was.

6 A. No.

7 Q. You don't know?

8 A. I don't know.

9 Q. And you said you don't know the date of the
10 recordings. Is there a reason that you don't know
11 the date?

12 A. Yes.

13 Q. What is that reason?

14 A. The informant didn't state the date at the
15 beginning or the end of the recording.

16 Q. Okay. Well, he had some high-tech FBI
17 recording device, didn't he?

18 A. That's your opinion. I don't consider it
19 high-tech.

20 Q. So it's an unreliable recording device?

21 A. It's reliable, but I wouldn't call it
22 high-tech.

23 Q. Is there a reason the FBI recording device
24 doesn't record the date of conversations that are
25 being made by its informants?

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1 A. That's not my area of expertise.

2 Q. How are you sure it was February 2016?

3 A. I met Billy Cordova just a few weeks before
4 that. He agreed to go up there. We transferred him;
5 gave him the device. And that was in February. We
6 collected it before the month was over.

7 Q. Okay. So you personally provided him with
8 a device?

9 A. No, because I can't walk into the facility
10 freely. But I set in motion him receiving a device.

11 Q. And did you check out the device?

12 A. Me or one of the agents who works with me
13 did.

14 Q. Was it you or somebody else?

15 A. I can't tell you. I don't know. We'd have
16 to look at the logs.

17 Q. And did you collect the device?

18 A. No, not from the informant, because, again,
19 I can't get in the facility to do that. So I would
20 have collected by way of Corrections.

21 Q. So the way the device was transferred to
22 Mr. Cordova is it went from you or some other agent
23 to a New Mexico Department of Corrections official of
24 some sort?

25 A. Yes.

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1 Q. And he or she provided the device to Mr.
2 Cordova?

3 A. Yes.

4 Q. And then, that or some other corrections
5 official, collected it from Mr. Cordova?

6 A. Correct.

7 Q. And then gave it back to somebody in the
8 FBI?

9 A. Yes.

10 Q. And all of that happened in February of
11 2016?

12 A. It did.

13 Q. Which is how you know the conversations
14 recorded on the device had to be sometime in
15 February --

16 A. Yes.

17 Q. -- 2016?

18 When you spoke with Mr. Cordova about
19 wearing the electronic surveillance device or using
20 the electronic surveillance device, was he at a
21 different institution?

22 A. Yes.

23 Q. And once he was transferred to PNM, did you
24 speak to him any further?

25 MR. CASTELLANO: Objection, relevance.

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1 THE COURT: Tie it to the James hearing.

2 Q. Let me go -- once he was transferred to
3 PNM, did you go to PNM and personally speak with him
4 about the device or the conversations he was
5 recording on it?

6 A. Not in February 2016, no.

7 Q. Prior to sending Mr. Cordova, or having Mr.
8 Cordova transferred up to PNM did you -- you or
9 anybody else in your presence -- provide him with
10 instructions on how to operate the device?

11 A. Yes.

12 Q. And was it you?

13 A. I believe it was me.

14 Q. What did you tell him?

15 A. "Here's how you turn it on. Here's how
16 turn it off."

17 Q. Did you tell him anything else?

18 A. Yes. I explained to him that -- I pointed
19 out that it's a small device; consequently, it has
20 small batteries. And that I didn't want people's
21 life stories. I just wanted pertinent information,
22 so to keep it relevant to what we're looking for. He
23 can't just turn it on and let it run for days.

24 Q. I'm assuming -- implicit in that comment is
25 you told him what kind of information you wanted him

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1 to go get, right?

2 A. Yes.

3 Q. And specifically what did you tell him the
4 kind of information that you were sending him up
5 there to go get?

6 A. Information about the Javier Molina murder.

7 Q. And did you specifically tell him you
8 wanted statements that incriminated people that he
9 was housed next to?

10 A. No, I don't talk like that. I told him I
11 wanted information about Javier Molina's murder. And
12 he knew he'd be next to Rudy Perez.

13 Q. You told him that: Once you go up to PNM,
14 you'll be housed next to Mr. Perez?

15 A. Yes.

16 Q. Was Mr. Cordova -- I'm sorry, did you
17 discuss with Mr. Cordova what you believe to have
18 happened with respect to the homicide of Molina?

19 A. No.

20 Q. Did Mr. Cordova have access to any
21 discovery materials?

22 A. No.

23 Q. And what sort of -- I mean, Mr. Cordova
24 obviously isn't somebody that does something for
25 nothing. What was he expecting in exchange for going

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1 and getting these statements?

2 MR. CASTELLANO: Objection, relevance.

3 THE COURT: Tie it to the James hearing.

4 What's the relevance of it?

5 MS. JACKS: I'll withdraw the question for
6 the time being.

7 THE COURT: Okay.

8 MS. JACKS: I have nothing further at this
9 time.

10 THE COURT: All right. Thank you, Ms.
11 Jacks.

12 Do you want to go next, Mr. Villa?

13 MR. VILLA: I'm happy to, unless one of my
14 colleagues wants to.

15 THE COURT: I think they're deferring to
16 you, Mr. Villa.

17 MR. VILLA: And, Your Honor, Mr. Castellano
18 was relying on some transcripts that he showed to
19 Agent Acee for refreshing his recollection, I
20 imagine, that he read to the Court. I was just
21 wondering if I can use those same materials.

22 THE COURT: Any objection, Mr. Castellano?

23 MR. CASTELLANO: Not at all, Your Honor.
24 All I would say, if we can just keep them in this
25 order, because these will be exhibits for the next

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1 hearing. But as long as I get them back, there is no
2 problem with anyone using them.

3 THE COURT: Can you keep them in order, Mr.
4 Villa?

5 MR. VILLA: Yes, Your Honor. It looks like
6 it's already -- has it already been admitted?

7 MR. CASTELLANO: Your Honor, one of these
8 is Exhibit 16, which was already admitted in one of
9 the previous hearings, but the other ones have not
10 been. I have exhibit stickers on them without
11 numbers. So 16 has been admitted, but the rest have
12 not, so I identified them by the Bates number.

13 THE COURT: Thank you, Mr. Castellano.

14 Mr. Villa.

15 EXAMINATION

16 BY MR. VILLA:

17 Q. Good afternoon, Agent Acee.

18 A. Good afternoon.

19 Q. So with respect to your handling of Mr.
20 Cordova, you told him that it was a small device and
21 so it had a small battery life; correct?

22 A. Yes.

23 Q. How long was the battery life?

24 A. I don't know. I mean, the techs give us a
25 guess, but they're not reliable.

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1 Q. We're talking about a digital recording
2 device, right?

3 A. Yes.

4 Q. You called it a body wire, but it's not a
5 wire that he wears on his body, right?

6 A. It is not.

7 Q. It's like a little recording device,
8 rectangular in shape?

9 A. Yes.

10 Q. Something like I could pick up at Best Buy?

11 A. I don't think so.

12 Q. No?

13 A. I haven't seen one there.

14 Q. Produced at the Department of Justice, or
15 something you can get commercially?

16 MR. CASTELLANO: Objection, relevance.

17 This is going to the subject of the motion to
18 suppress. I would just ask that we focus on
19 statements.

20 MR. VILLA: We can deal with it next week,
21 Judge.

22 THE COURT: All right.

23 Q. You said that you knew he'd be next to Mr.
24 Perez. How did you know that?

25 A. I knew Mr. Perez had some kind of sanction

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1 or disciplinary action, and he was being sent to
2 Level 6 to do some amount of time there. And our
3 strategy was to put what I'll call wired informants
4 next to Mr. Perez and Mr. Herrera, to see if we could
5 collect information about the Molina homicide.

6 So my conversations with Corrections,
7 trying to figure out how to make that happen --
8 because I'm not able to do that without them -- I
9 learned that Mr. Perez was due to be sent up there.
10 And so then we put in motion those two inmates being
11 next to each other. The mechanics of that I rely
12 largely on the Corrections to tell me when that could
13 happen.

14 Q. Because they're the ones that put people
15 where they're supposed to go in their cells, or
16 housing plans, that sort of thing.

17 A. Yeah. They move the bodies.

18 Q. So getting back to the question about these
19 statements that Mr. Perez made, and whether he had
20 personal knowledge or whether he was telling Mr.
21 Cordova things that he, himself, had learned,
22 second-, or perhaps thirdhand, did you have any
23 information before putting Mr. Cordova next to Mr.
24 Perez, or helping to arrange that, that Mr. Perez did
25 have this knowledge firsthand or secondhand or

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1 thirdhand?

2 A. I believed he did. But I wanted evidence
3 of it.

4 Q. So you didn't have -- well, what was your
5 belief based on?

6 A. My review of the old -- what I'll call "the
7 old SNM files," I inherited those as part of this
8 case, and information that I had learned from
9 cooperators.

10 Q. Did any of that include statements that Mr.
11 Perez himself had made either in a document you
12 reviewed or to a cooperator?

13 A. I remember reviewing his statements that he
14 made to either detectives or STIU.

15 As far as with regard to cooperators, I
16 couldn't tell you which cooperators; there is too
17 many of them. But I believe that I did have
18 information from cooperators. But I wanted
19 recordings.

20 Q. Okay. And the information that you had
21 from cooperators, was that firsthand information from
22 Mr. Perez, so Mr. Perez saying: I did X, or I did Y?

23 A. No, I think it's more of guys relating what
24 they heard. I can't say that it was firsthand.

25 Q. And the statements that Mr. Perez made,

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1 that you reviewed to STIU, or to detectives, those
2 were the statements made in the aftermath of the
3 Molina homicide?

4 A. Yes, sir.

5 Q. Statements that we've examined for the
6 previous motion?

7 A. Yes.

8 Q. So it's fair to say that you suspected
9 perhaps he had a role in providing pieces from his
10 walker?

11 A. At best, I suspected.

12 Q. And you told Mr. Cordova that's what you
13 wanted him to talk to Mr. Perez about?

14 A. Yes. I don't know that I mentioned the
15 walker. I just said "the Molina homicide."

16 Q. So, for instance -- let me jump to the
17 right page here. I believe it's 20557.

18 A. I have copies, too. Do you want me to go
19 to that?

20 Q. Let's see here. No, I'm sorry. I'll get
21 it for you. So there is the part where Mr. Cordova
22 and Mr. Perez are talking about the pieces coming
23 from his walker; correct?

24 A. Yes.

25 Q. And Mr. Cordova asks -- hang on just a

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1 second here. Well, right here where I'm -- wrong
2 one. Mr. Cordova asks, "Yeah, and then yeah they
3 used those as the fierros, you know what I'm saying?"

4 A fierro is a shank; correct?

5 A. Yes.

6 Q. He's referring to the pieces which were
7 brought up here -- I just pointed to it earlier --
8 from the walker, right?

9 A. Yes.

10 Q. So do you know how Mr. Cordova had the
11 knowledge, or the allegation anyway that Mr. Perez
12 gave pieces, or pieces were taken from his walker to
13 make shanks?

14 A. Are you asking for my opinion, or --

15 Q. No, I'm asking if you know how Mr. Cordova
16 knew that?

17 A. I think I do.

18 Q. Okay. Go ahead.

19 A. Most of the guys in the S know quite a bit
20 about that hit.

21 Q. About the Molina hit?

22 A. Yes.

23 Q. And just from talking to each other?

24 A. Yes.

25 Q. And you know that from talking to the

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1 cooperating witnesses?

2 A. Yes. And I mean, I interview a lot of SNM
3 guys, and not all of them cooperate. They'll talk to
4 me but, they don't want to cooperate. But I know it
5 from talking to probably close to 100 members or
6 associates, former members.

7 Q. So a lot of those guys know about the
8 Molina murder, right?

9 A. Guys that were in the feds at the time,
10 yes; weren't even in the state know about it.

11 Q. Weren't even in the blue pod?

12 A. Correct.

13 Q. Word travels fast?

14 A. It's been a few years.

15 Q. So this information that Mr. Cordova knew
16 about the Molina homicide or the source of the shanks
17 for the Molina homicide, you didn't provide that to
18 Mr. Cordova?

19 A. No.

20 Q. He knew it on his own, before he gave
21 these -- or had these recordings made of Mr. Perez?

22 A. Yes. In fact, when I first met Mr.
23 Cordova, he related a lot of details of that homicide
24 to me. And I didn't expect that when I met him.

25 Q. So you were surprised at the knowledge he

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1 had?

2 A. I was surprised he even talked to me.

3 Q. And the knowledge he had was gained from --
4 like many of the other members of the SNM, talking to
5 other people in the gang, talking about what happened
6 because the word travels fast, right?

7 A. Yes.

8 Q. But you knew that Mr. Cordova, himself,
9 didn't have direct knowledge about how the shanks
10 were made or whether they were taken from Mr. Perez'
11 walker?

12 A. I didn't know what he knew until I started
13 talking to him. Some guys obtain confessions from
14 people that were present in blue pod. But Mr.
15 Cordova was pretty popular and had talked to a lot of
16 guys, so I think he had some firsthand knowledge when
17 I first met him.

18 Q. And as you testified a minute ago with
19 Ms. Jacks, you don't know whether Mr. Perez'
20 knowledge about the shanks or the source of the
21 shanks came from secondhand information or firsthand
22 information that he knew himself?

23 A. Well, I don't know what Mr. Perez knew,
24 because I've never talked to him.

25 Q. So it's possible that he got knowledge

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1 about the Molina homicide just like many of the
2 others, through word-of-mouth?

3 A. Not according to his recordings, no.

4 Q. Well, before these recordings got made?

5 A. Well, I didn't know what Mr. Perez knew
6 before the recordings, no.

7 Q. Okay. Fair enough.

8 You testified that you weren't certain who
9 provided the recording device on a particular day to
10 an NMCD official, to then provide it to Mr. Cordova.
11 And I think you said you needed to check the logs.

12 THE COURT: Hold on just a second.

13 MR. CASTELLANO: Objection, relevance.

14 We're not talking about statements at all at this
15 point.

16 THE COURT: Can you wait on this?

17 MR. VILLA: Yes, I guess so. It's fair.

18 Q. You would agree with me that the -- if
19 there was a conspiracy to murder Javier Molina, that
20 conspiracy was over by the time these statements were
21 made?

22 A. I assume so. When does the conspiracy end?

23 Q. Well, if it's a conspiracy to murder Javier
24 Molina, wouldn't it be when Mr. Molina is killed?

25 A. I suppose, unless they were still getting

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1 rid of evidence years later. But, yeah, it sounds
2 like it was over.

3 Q. Well, that might be a conspiracy to destroy
4 evidence or tamper with evidence, right?

5 A. Yeah, I guess if the walker showed up
6 today, it would still be -- if someone had been
7 hiding it this whole time, maybe we could pull them
8 into that. I'm not sure. I'd have to talk to the
9 U.S. Attorney's office on that.

10 Q. Would you pull in some of these NMCD guys
11 on that conspiracy? Just kidding.

12 But there is no question that these
13 statements were made 23 months after Javier Molina
14 was killed? Approximately 23 months.

15 A. No question.

16 Q. All right. Getting back to -- it's on
17 20540, Bates number, the statements Mr. Perez made
18 about "Crocodile." Okay. So they are right here in
19 the center when Mr. Perez said, "Yeah, and you know
20 check this out, and it's like what was discussed,
21 'Crocodile' about has to answer for it." Did I
22 understand your testimony you don't know who
23 "Crocodile" is?

24 A. I've heard of him. But off of top of my
25 head, no, he wasn't a focus of this case.

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1 Q. Okay. Did BB -- the other person
2 identified in the same statement, did you testify
3 that was Javier Rubio?

4 A. I did.

5 Q. And you were interpreting that statement as
6 to mean they had to answer for not carrying out the
7 Javier Molina murder at some point earlier in time?

8 A. Correct.

9 Q. Do you have any knowledge about how Mr.
10 Perez gained his knowledge that he conveyed to Mr.
11 Cordova about these two individuals?

12 A. No.

13 Q. Or about how they were supposed to have
14 carried out a hit of Javier Molina?

15 A. No.

16 Q. How was it that you came to the conclusion
17 that this conversation was about carrying out a hit
18 on Javier Molina?

19 A. The short answer is my knowledge of the
20 case. And I've debriefed Javier Rubio, BB.

21 Q. I see. So you're making the conclusion
22 about what Mr. Perez is saying here based upon your
23 knowledge of the case, a debrief of Mr. Rubio, that
24 sort of thing?

25 A. Yeah, my interpretation of it, yes.

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1 Q. Okay. Would you agree with me, in the
2 course of these conversations that Mr. Perez and Mr.
3 Cordova had, that we've been reviewing for this
4 hearing, that the recording device appears to have
5 been turned on and off; correct?

6 | A. Absolutely.

7 Q. So all these recordings that you've
8 reviewed are from a series of different digital audio
9 files?

10 A. Yes.

11 | (Ms. Jacks left the courtroom.)

12 Q. And a lot of the times the recordings are
13 turned off what I would say midstream?

A. Turned on midstream as well.

Q. Okay. So that was my second question.

16 They're turned off midstream, meaning in the middle
17 of the conversation, right?

18 A. Yes.

19 Q. Or at least it appears the conversation is
20 not ended, right?

21 A. I agree with you.

Q. And turned on in the same fashion?

23 A. Yes.

24 Q. And it was Mr. Cordova who had complete
25 control to turn on and off the device, as you

1 testified?

2 MR. CASTELLANO: Objection, relevance.

3 MR. VILLA: Well, I think that does go to
4 whether we've got a complete conversation here.

5 THE COURT: I'll give you a little room
6 here. Overruled.

7 A. Mr. Cordova was in sole control of that
8 device being turned on or off, absent a battery
9 failure or being out of power, yes.

10 Q. And then was it the same procedure for you
11 to get the recording device back; you had to get it
12 from an employee of NMCD?

13 A. Yes.

14 MR. VILLA: May I have just a moment, Your
15 Honor?

16 THE COURT: You may.

17 MR. VILLA: That's all the questions I
18 have.

19 THE COURT: Thank you, Mr. Villa.

20 Any other defendant have -- Mr. Maynard?

21 MR. MAYNARD: Your Honor, I wasn't here
22 last week, so I'm not sure if I'm taking the
23 issues -- the questions out of turn.

24 THE COURT: All right.

25 MR. MAYNARD: The Court is going by

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1 declarant or by defendant?

2 THE COURT: Well, I probably won't
3 interrupt you, but Mr. Castellano might. So just
4 plow ahead.

5 EXAMINATION

6 BY MR. MAYNARD:

7 Q. Now, Mr. Acee, you testified, was it last
8 week --

9 A. Yes, sir.

10 Q. -- about these James statements?

11 A. I did.

12 Q. Okay. Co-conspiracy statements?

13 A. Yes, sir.

14 Q. All right. And you testified briefly this
15 afternoon about -- is that a continuation of your
16 direct?

17 A. Yes, it was.

18 Q. All right. Now, your testimony right here
19 was about statements made -- recorded by Mr. Cordova,
20 and made by Mr. Perez?

21 A. That's correct.

22 Q. And this was in February of 2016?

23 A. Yes, sir.

24 Q. And shortly thereafter, or maybe at the
25 same time recordings were being made with respect to

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1 Mr. Herrera, Carlos Herrera?

2 A. Yes, they were, by two different
3 informants.

4 Q. Okay. So the recordings that were made of
5 Mr. Herrera's statements were from a different
6 informant?

7 A. Well, there were two. Mr. Cordova was one
8 of the informants that recorded Mr. Herrera. And
9 Mr. Gerald Archuleta also recorded Mr. Herrera.

10 Q. Okay. Both did?

11 A. Both did.

12 Q. Okay.

13 A. And I believe at different times.

14 Q. And this was in February and March of 2016?

15 A. I'd want to look at our reports. But that
16 sounds about the time frame. Because we picked up
17 Mr. Archuleta in December, and it took some time to
18 work all that out.

19 Q. Now, you testified to statements that were
20 recorded and put on a transcript this afternoon?

21 A. Yes, sir.

22 Q. In your opinion, from your understanding of
23 the context, are any references being made directly
24 or indirectly in any of those statements to Carlos
25 Herrera, the ones that you referred to, and that were

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1 brought out in the Bates stamped transcripts today?

2 A. Just today? Your question is --

3 Q. Just about today for now.

4 A. I don't believe so.

5 Q. And have you gone into yet the supposed or
6 alleged James statements made by Mr. Herrera?

7 Because these were made by Mr. Perez.

8 A. Correct. I think I may have covered that
9 last week. And I believe my colleague, Agent Stemo,
10 did as well. And I was -- we kind of split -- there
11 were so many transcripts and stuff, we kind of split
12 the duty last week.

13 Q. Okay. Now, you're familiar with most all
14 of the James statements that you have obtained, that
15 the FBI has obtained, during the investigation?

16 A. Don't give me too much credit, sir. I've
17 got a lot of reports up there. I mean, I have
18 reviewed them at one time. But I definitely need to
19 look at them again.

20 Q. I understand perfectly well. I've been
21 trying to do this for just a few days.

22 Now, looking back over the statements made
23 by other defendants and other people involved -- not
24 Mr. Cordova, not Archuleta -- are there other
25 statements in which Mr. Carlos Herrera is a

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1 participant in conversations, co-conspiracy
2 conversations according to any information available
3 to you?

4 A. Yes. So if I understand you correctly, did
5 Mr. Herrera participate in conversations other than
6 were recorded by either one of the informant?

7 Q. Right.

8 A. Yes.

9 Q. And I may be taking this out of turn, but
10 do you have these statements indexed? Do you have an
11 index?

12 A. Can I point you to them?

13 Q. Do you have an index of co-conspiracy
14 statements?

15 A. A mental one, or --

16 Q. Or one written?

17 A. No.

18 Q. Because what I would like to do -- and I
19 don't know if I'm out of turn -- but I'd like to go
20 through them one by one.

21 A. I'll defer to somebody else on that.

22 Q. During the conspiracy, and in furtherance
23 and VICAR conspirators.

24 A. I think I understand what you're asking.
25 I'm just not sure how to proceed.

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1 Q. Well, the first one that comes to mind.

2 A. Would you like names of people who have
3 mentioned him; is that what you're asking me?

4 Q. Yes.

5 A. Okay. So Mario Rodriguez, "Blue."

6 Q. Now, these are conversations that you've
7 come to be aware of through your investigation?

8 A. Yes, sir.

9 Q. Okay.

10 A. Timothy Martinez, "Red."

11 Q. "Red"?

12 A. "Red." There is a "Blue" and there is a
13 "Red."

14 Q. Okay.

15 A. Jerry Armenta, "Creeper."

16 Q. And you have 302s reflecting these?

17 A. Yes, sir.

18 Q. Okay.

19 A. Which I prefer to have in front of me when
20 I do this.

21 Q. I understand.

22 A. Okay. So I said Jerry Armenta.

23 Jerry Montoya, JR or "Plaz," or "Little
24 Plaz."

25 And this is where I'm slowing down, because

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1 we've interviewed so many SNM members. I believe
2 there were some individuals up at the RPP Program,
3 which is the gang dropout program. We interviewed
4 everybody up there as well. And there are -- forgive
5 me, sir, but there are literally dozens, you know, a
6 significant number of 302s.

7 Q. Sure.

8 A. So tough to do, but I think the names I
9 gave you are the people that were all present in the
10 pod, and --

11 Q. Present in what pod?

12 A. Blue pod. And gave statements. Oh, I left
13 out a significant one. That's Lupe Urquiza,
14 "Marijuana."

15 So if I had to point you to the 302s, those
16 would be the ones I would certainly want to start
17 with, if I were in your position, sir. But I want to
18 note that there are going to be other ones. I just
19 can't come up with them all as I sit here.

20 Q. Is that advice for defense counsel?

21 Anyway.

22 Now, these are not recorded that you're
23 referring to; these are just other -- these are 302s
24 from interviews with suspects or with members?

25 A. Yes, sir. I mean, some of the -- to be

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1 clear, some of the conversations I had with these
2 guys are recorded. But they're not your client or
3 Mr. Perez. Those gentlemen aren't recording those
4 guys. This is just me taking a statement from
5 somebody, and some might be recorded. So there could
6 be some recordings.

7 Q. In any of the recordings, are there any
8 confessions made that are -- you know, made by Mr.
9 Herrera that are recorded?

10 A. No. The only recordings of Mr. Herrera are
11 either jail calls. And I can't think of anywhere he
12 discusses the homicide, or the conversations with the
13 two informants.

14 Q. That were recorded?

15 A. Yes, sir.

16 Q. Well, are there any admissions or
17 confessions in those conversations? You've seen the
18 transcripts, haven't you, or you've listened to them?

19 A. I have. And I believe there are.

20 Q. And you believe there is a confession, or
21 an admission? Which?

22 A. I believe there is an admission by Mr.
23 Herrera for his role, describing his role, an
24 admission relevant to, or pertaining to his role in
25 that incident.

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1 Q. And what would that role be?

2 A. Well, he had a lot of opinions about it.

3 But specifically passing the paperwork on to the guys
4 in blue pod, and reviewing the paperwork, seeing the
5 paperwork.

6 Q. And you remember having seen that in a
7 transcript?

8 MR. MAYNARD: May I approach the witness,
9 Your Honor?

10 THE COURT: You may.

11 Q. And I'll be loaning to the witness a
12 transcript that's Bates No. 20839. And if you'd just
13 take a couple of minutes and see if you might see it
14 in this particular document. You may not, but this
15 is not the only one.

16 A. Do you know which CHS this is?

17 Q. My understanding is that this informant is
18 Mr. Davila, but I may be incorrect.

19 A. Mr. --

20 Q. I mean, Mr. Cordova.

21 A. Okay. I hate to take this much time to do
22 this. I think I found probably the first reference,
23 and I'm on -- I guess it's Bates No. 20843. I'm at
24 the middle of the page. Mr. Herrera's sentence
25 starts with, "And they wanna sit there."

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1 Q. Where?

2 A. Yes, sir. This is where I'm referring to
3 this statement in here.

4 Q. Okay.

5 A. I'd have to -- what would you like me to
6 do?

7 Q. No, just if you'd point it out what you
8 think is an implicating statement?

9 A. Yes, sir.

10 Q. And why do you think it's implicating?

11 A. What I believe Mr. Herrera is talking about
12 here is, after the fact, the guys in the SNM are
13 talking about what happened with Javier. And here it
14 just says, "Javier," but I believe that's Javier
15 Molina. And he says, "And they wanna sit there and
16 talk all that shit when that shit happened with
17 Javier. They were hurt about me. And they said, a,
18 that fucking" -- unintelligible -- "I was" --
19 unintelligible -- "and, a" -- unintelligible --
20 "fucking" -- unintelligible -- "when you wanna
21 criticize people that are on the tabla because they"
22 unintelligible -- "because it wasn't done correctly.
23 Well, why did you do -- everybody has their own" --
24 unintelligible -- "carnal" -- unintelligible --
25 "what's your solution then?"

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1 Q. Now, unless you listen to the recording,
2 you don't know how long the unintelligible
3 information is in those breaks, do you?

4 A. I think it's just a word or two that our
5 interpreters didn't understand.

6 Q. And can you even tell if, in fact, the
7 recording had been turned off for a few seconds or
8 for a minute? Is there a way technically to find
9 out?

10 A. Yes, there is. And I don't believe that's
11 what happened in the middle of this statement.

12 Q. And you've listened to it?

13 A. Yes, sir.

14 Q. And what makes you believe not? What makes
15 you believe it hasn't been tampered with, on and off?

16 A. Because it flowed continuously. The
17 "unintelligible" is not silence. It's not a break in
18 conversation. It's -- some other noise covers it, or
19 the person listening can't make out word, the
20 specific word that was said. But these sentences
21 flow pretty well. And it looks like there is just a
22 missing phrase or word.

23 Q. Or there could be a missing sentence?

24 A. There could be.

25 Q. All right. And go on. If you find another

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1 implicating statement.

2 So you think he's talking about himself in
3 that particular excerpt that you mentioned?

4 A. I do. I think he's part of the tabla that
5 he's referencing.

6 Q. But if he's not part of tabla, maybe he's
7 talking about someone else.

8 A. If he's not part of it?

9 Q. Right.

10 A. I don't think he's not part of it. I think
11 he is part of it.

12 Q. I understand.

13 A. Okay. I think I just went -- I did, I just
14 went to the next page, at 20844. On this page we're
15 in the -- starts off with the long statement by Mr.
16 Herrera.

17 Q. And that statement has probably close to
18 two dozen unintelligible gaps?

19 A. Sir, I would say there is some
20 unintelligible words. With respect, I disagree on
21 saying they're gaps. Did you want me to read what
22 I'm referring to?

23 Q. Are you talking about the upper half of
24 that page?

25 A. Yes, sir, probably a few sentences in.

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1 Q. Okay. And any other -- I don't want to
2 take up more time than is necessary, but I'd like
3 to -- if you can go through it.

4 A. Keep going?

5 Q. Keep going.

6 A. Okay. The next one, I would point you to
7 20845, the last statement on the page by Mr. Herrera,
8 and it flows into the next page.

9 Q. All right. And what puts this -- what's
10 the context in this that implicates, in your opinion,
11 Mr. Herrera?

12 A. I think this speaks to the -- I think what
13 they're talking about is they're touching a little
14 bit on the background of the failed hits before, the
15 last two times it came down; things were good in
16 Cruces. There was some politics and some drama
17 there. The orders had come down a couple of times.
18 My understanding is that the guys that had the keys
19 and were running Southern liked when things were
20 peaceful. And I think that part of this conversation
21 talks about that.

22 Q. You refer to having "keys." What do you
23 mean by that?

24 A. Being in charge of the facility for the
25 SNM.

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1 Q. Okay.

2 A. And that when the paperwork came down, it
3 was rejected by certain individuals because things
4 were good: Drugs were coming in, people were getting
5 along. And that was important to those that were
6 there.

7 So, to specifically answer your question, I
8 think that they're talking about some of the politics
9 in that.

10 Q. So this may not relate to the Molina
11 homicide?

12 A. I think it does. Because Mr. Herrera seems
13 to go on, and he's discussing the fact that -- that
14 it ultimately does happen, and now some of the same
15 people are upset. They were complaining that it
16 wasn't happening. It happened. And now they're mad
17 that it did happen, and everyone is on lockdown.

18 Q. So people are complaining about being on
19 lockdown?

20 A. As an aftermath of the hit. And then that
21 is a reference that the feds are coming and the RICO
22 Act -- they're bringing the RICO Act.

23 Q. All right. So they're complaining -- he's
24 talking about lockdown?

25 A. Well, he's talking about -- I have to read

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1 it more closely. I had moved on, but what he's --

2 Q. You can move on.

3 A. Okay.

4 Q. If I could interrupt. Let me ask you this
5 way: is a lot of the conversation about gang politics
6 and not necessarily about Molina?

7 A. A lot of it is. But I thought you were
8 asking me to show co-conspirator statements.

9 Q. Right, regarding the counts relating to the
10 death of Mr. Molina.

11 A. Sure. And I respect that we might
12 disagree. I think some of these politics -- because
13 Mr. Herrera exerts what he thinks the politics should
14 be, and what the philosophy should be. And think
15 that's on point with what happened in Molina. But
16 that's just --

17 Q. That's your opinion?

18 A. -- my opinion, sir.

19 Q. In fact, he's also complained about
20 decisions made higher up than he is?

21 A. Absolutely.

22 MR. MAYNARD: All right. No further
23 questions.

24 THE COURT: Thank you, Mr. Maynard.

25 Any other defendant? Mr. Adams, did you

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1 have questions?

2 EXAMINATION

3 BY MR. ADAMS:

4 Q. Chris Garcia was not in custody in 2014;
5 correct?

6 A. I don't think he was.

7 Q. And he was arrested December 3, 2015, when
8 you took down all the people who were out on the
9 streets?

10 A. Yes, sir.

11 Q. And he's not alleged to have any
12 involvement in the Molina homicide?

13 A. None at all.

14 Q. And, in fact, he wasn't even incarcerated
15 at the time when Mr. Molina was killed, and was not
16 in the unit?

17 A. He may have been in the feds. I can't
18 remember. But, no, he wasn't down in Southern New
19 Mexico.

20 Q. So is it a safe assumption on my part that
21 none of the statements related to the Molina homicide
22 are in any way being offered by you as James
23 statements against Mr. Garcia?

24 A. Yes, sir, that's correct.

25 MR. CASTELLANO: Your Honor, I'm going to

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1 object, because it calls for a legal conclusion, and
2 that will be for the parties to argue to the Court.

3 THE COURT: All right. Well, I'll let him
4 testify. And I think I'll have to sort out what is a
5 legal conclusion or not. But I'll allow him to
6 testify.

7 MR. ADAMS: Judge, I guess what's going to
8 help me in the scope of my questioning, if there are
9 a bunch of statements that are being offered against
10 other defendants related to the Molina homicide, and
11 not Mr. Garcia, then I don't have a dog in that
12 fight. But if those statements are also being
13 arguably used against Mr. Garcia, who had no
14 involvement at all in that incident, then we need to
15 explore a lot more than I thought we would be
16 exploring.

17 THE COURT: Mr. Castellano?

18 MR. CASTELLANO: I understand where Mr.
19 Adams is coming from, but Agent Acee won't be making
20 that determination. I'm okay if he asks those
21 questions. But our arguments won't be to that. But
22 he's welcome to ask them.

23 THE COURT: Okay. So you're pretty
24 restricted on questioning. But I'm going to have to
25 sort out down the road. It sounds like these

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1 statements are going to be offered against
2 Mr. Garcia, right?

3 MR. CASTELLANO: Yes, Your Honor. As I
4 explained to Mr. Adams on the break, some of these
5 statements relate directly to the murder, so
6 therefore, they are clearly co-conspirator
7 statements, if they relate to the murder.

8 But the issue with the VICAR and the
9 enterprise is that there are other conspiracies out
10 there, and there are other elements that are met by
11 the statements. Some of these statements could even
12 result, or result in co-conspirator statements as
13 relating to a legal conspiracy. And these statements
14 don't have to be charged to be co-conspirator
15 statements. That's my point about what we're
16 bringing in here.

17 THE COURT: But the bottom line is these
18 statements are going to be used against Mr. Garcia,
19 right?

20 MR. CASTELLANO: They are, Your Honor, I
21 agree. We will tend to use them in that way against
22 all members of the enterprise.

23 MR. ADAMS: Judge, I find that to be a bit
24 of a curious position taken by the Government --

25 THE COURT: It may be.

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1 MR. ADAMS: -- for this reason --

2 THE COURT: But for right now you just need
3 to get these statements out.

4 MR. ADAMS: Yes, sir.

5 THE COURT: Because at least the
6 Government's position is they're trying to use them
7 against Mr. Garcia.

8 MR. ADAMS: That's what I'm hearing. But
9 the other day they said they were calling Agent Stemo
10 to testify, to put in the statements about the Molina
11 conspiracy. And then they referred to the Marcantel
12 conspiracy as separate conspiracies. And now their
13 position is they don't want to be limited by their
14 own view of two separate conspiracies.

15 THE COURT: Well, I shouldn't be making
16 arguments for the Government, but I'm trying to
17 formulate this in my head, so I'm talking out loud to
18 try sort to it out myself. What I understand is that
19 they are using certain agents to get the James
20 statements to the defendants and to the Court. And
21 so they're using different people. And they broke it
22 down by conspiracy between Molina, and then the
23 Corrections Secretary. But they're not conceding by
24 doing that that all this evidence is going to be used
25 against each of the defendants in the first trial.

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1 How did I do? Did I state your position?

2 MR. CASTELLANO: Yes, Your Honor. And for
3 example, from time to time, when we had a conspiracy,
4 when we're talking about statements by certain
5 people, I flagged that I was deviating and touching
6 on another potential conspiracy.

7 For example, in the Baca statements, I
8 highlighted a conspiracy to murder members of
9 Mr. Armenta's family. So I did try to deviate and
10 highlight other things that were out there, including
11 the drug conspiracy and a conspiracy by Mr. Baca to
12 bring drugs into a facility. So I highlighted those
13 where I could. But we're definitely not painting
14 ourselves into a corner saying Molina's (sic)
15 statements only go to Molina.

16 THE COURT: Let me ask: Maybe I'm
17 interpreting the Government's position too broadly.
18 But when you have an enterprise, are you saying that
19 whole enterprise is a conspiracy, so that any
20 statements in furtherance of the enterprise can be
21 used against any member of the enterprise?

22 MR. CASTELLANO: Well, I don't think that
23 we're saying the enterprise is a conspiracy. But
24 these statements touch on other elements of the
25 crime. So, for example, we have to prove the

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1 enterprise engaged in racketeering activities. Any
2 of these statements which establishes another crime
3 is something that establishes that the enterprise has
4 engaged in racketeering activity. And so that's
5 something that might be used against other
6 defendants.

7 THE COURT: Okay.

8 MS. SIRIGNANO: Your Honor, just a point of
9 clarification. And I was on the phone during the
10 last hearing when this happened. And I remember what
11 the agreement was, was that some of us wanted to go
12 forward with these James hearings, and some of us
13 wanted to have the Government write down what the
14 statements would be. I don't know if it was split
15 out between the Group 1 trial and the Group 2 trial.
16 But I just remember not everybody wanted to go
17 forward with this hearing.

18 So based on what I'm hearing from the
19 Government at this point, based on that all these
20 statements are going to be used against all
21 defendants, I'm to assume that we have to wait until
22 we get these statements from the Government in
23 writing, which was the agreement that was proposed at
24 the last hearing? I'm just curious --

25 THE COURT: My understanding is that this

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1 James hearing is basically against the five
2 defendants that are going to go on January 29.

3 MR. CASTELLANO: That's how it ended up.

4 THE COURT: That the others -- there were
5 some other people that had agreed to take the written
6 statements that the Government had always wanted to
7 proceed. But given the fact that we were barreling
8 toward trial on the 29th, they were prepared to go
9 ahead and give you what you wanted.

10 MS. SIRIGNANO: Okay. I guess that just
11 doesn't jive with what I'm hearing right now, based
12 on the Government's theory, or statement to all of us
13 that any co-conspirator statement, whether or not it
14 comes out at this hearing, or in written form, could
15 be used to prove up the -- any alleged criminal act,
16 or based on their enterprise evidence to be used at
17 trial. And so I'm just trying to get a clarification
18 of that, because if they're going to try and bring in
19 statements that aren't subject of an actual hearing,
20 I'd like to be able to plan for that.

21 Quite frankly, we weren't ready to go
22 forward with this today. So I just need to know one
23 way or the other.

24 THE COURT: Well, I do want to correct --
25 it's at the bottom of my notes here from Ms. Wild.

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1 It says: "If there is time left, evidence will
2 resume on the James hearing." So I certainly came
3 down here expecting that if we barreled through
4 motions, we would be at a James hearing. So I don't
5 think that's quite fair.

6 But let me let Mr. Castellano respond on
7 the -- we're not getting all the evidence of the
8 enterprise in the James hearing; is that correct?

9 MR. CASTELLANO: That's correct, Your
10 Honor. And I understand what they're saying about
11 statements. The way it broke down with the
12 stipulation at the last hearing was that the people
13 in the January trial, a number of them, decided they
14 did not want the statements in writing. So we
15 proceeded with breaking it down in that way. The
16 people in the April trial ended up being those who
17 wanted the statements in writing.

18 THE COURT: Let me give a shot at trying to
19 clarify what we're saying. You're going to prove two
20 conspiracies on January 29: One Molina; one the
21 Corrections Secretary, correct, those are your two
22 conspiracies?

23 MR. CASTELLANO: Well, those are the two
24 conspiracies -- well, those are the crimes we have to
25 prove.

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1 THE COURT: And those are the two
2 conspiracies that you're going to prove for
3 evidentiary purposes at the James hearing?

4 MR. CASTELLANO: Yes and no. Because, if
5 there is other evidence, then the other evidence
6 could be presented. But, yes, in terms of the trial
7 presentation, those are the conspiracies.

8 THE COURT: Those are the two conspiracies.

9 Now, you may have other evidence that
10 you're going to produce for purposes of establishing
11 enterprise, and for purposes of producing -- or
12 proving racketeering activity, other crimes in
13 furtherance of the enterprise, those sort of things.
14 But those, you will rely upon normal evidentiary
15 rules, other than the exemption for -- exception for
16 conspiracy, co-conspirator statements; correct?

17 MR. CASTELLANO: We will. And frankly, I
18 hadn't thought through it that well in terms of using
19 a lot of the co-conspirator statements for the Group
20 2 people. But I think those could be admitted. But,
21 of course, the Court hasn't ruled on those. So I'm
22 not sure we can admit them if the Court hasn't ruled
23 on them.

24 THE COURT: Well, the Group 2 people,
25 you're talking about the people we're going to try in

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1 April?

2 MR. CASTELLANO: That's correct.

3 THE COURT: All right. So I'm wondering,
4 though, if we can have some agreement that the
5 conspiracies that are in the statements that are
6 being provided for the April trial are not going to
7 be used in this case here under the exception for
8 co-conspirator statements. You may be able to get
9 that evidence in under other exceptions or other
10 rules of evidence. But it seems to me that, if
11 you're going to try to get it in for a co-conspirator
12 statement, then we need to probably -- not
13 probably -- we need to have it as part of this James
14 hearing.

15 MR. CASTELLANO: I agree with the Court,
16 that in order to introduce those, the other
17 statements, which are going to the April trial, we
18 would probably need to do that.

19 But the other part of an
20 association-in-fact enterprise is the ongoing nature
21 of the enterprise. So we may go back years, to
22 crimes predating the crimes charged in this
23 indictment. As the Court knows, we've got crimes
24 charged back to 2001.

25 THE COURT: But you would not rely on

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1 co-conspirator statements that are not being
2 introduced as part of this James hearing?

3 Let me see if I can articulate better. If
4 they don't hear from your agents in this James
5 hearing, which is the one for the January 29 trial,
6 they don't have to worry about it coming in to this
7 case under the exception for co-conspirator
8 statements. Is that fair?

9 MR. CASTELLANO: I understand the Court's
10 question. That is a fair question. I just hate to
11 limit our presentation of evidence at trial.

12 THE COURT: Don't you think I have to,
13 though? I mean, don't you think, if we're going to
14 have a meaningful James hearing, I've got to say: If
15 they're not going to bring it out here orally --
16 that's the way we've decided to proceed -- that you
17 can't use it -- you can use the evidence, but you
18 can't get it in through the co-conspirator
19 statements. You've got to get it in some other way.

20 MR. CASTELLANO: I understand what the
21 Court is saying. And --

22 THE COURT: I think that will have to be
23 the rules of engagement.

24 MR. CASTELLANO: I understand that. And I
25 think the Court would obviously have to rule on those

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1 other statements in order for them to be
2 co-conspirator statements anyway. So we could try to
3 focus on presenting other crimes, and possibly
4 staying away from the co-conspirator statements
5 themselves. I understand that.

6 THE COURT: Well, I'm not limiting you. I
7 mean, if you want to load these guys up and have them
8 present some more, you can. It's your James hearing,
9 and you're putting on your evidence. But I do think
10 the rules of engagement have to be that whatever
11 they're going to hear is an exception to the hearsay
12 rule under the co-conspirator statements, that
13 somebody has got to spit it out in a James hearing
14 here.

15 MR. CASTELLANO: I understand.

16 THE COURT: For the first one. Then we'll
17 figure out the rules of engagement for the second
18 one.

19 MR. CASTELLANO: I understand where the
20 Court is coming from. I'll discuss it with counsel.
21 And plan to proceed that way now. But there may be
22 something we want to bring out. We'll do that.

23 THE COURT: We may have to reopen the James
24 hearing.

25 MR. CASTELLANO: That's correct, Your

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1 Honor.

2 THE COURT: All right. Now, is that
3 addressing y'all's concerns? Did I get close?

4 MS. SIRIGNANO: Yes, Your Honor. Well, to
5 the extent for this hearing and not a new reopened
6 hearing, what I'm hearing is, is that we're going to
7 proceed today and finish this James hearing. But it
8 seems like they, once they consult with themselves on
9 how they're going to get statements in, whether it be
10 direct evidence or any other hearsay objection, or
11 they might need to reopen the James hearing, I
12 understand.

13 THE COURT: We're probably not going to
14 have a hearing on all of their evidence.

15 MS. SIRIGNANO: Yes, Your Honor.

16 THE COURT: I mean, the James hearing is
17 limited to co-conspirator exception, and getting that
18 evidence out. You're getting a lot of evidence with
19 suppression, so you're getting some free discovery
20 here, no doubt about it. But you're not going to get
21 everything.

22 MS. SIRIGNANO: I understand.

23 THE COURT: They get to put on evidence of
24 their enterprise, but they just won't get it in
25 through the co-conspirator statements.

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1 MS. SIRIGNANO: Thank you, Judge.

2 THE COURT: Does that address your
3 concerns, Mr. Lowry?

4 MR. LOWRY: Your Honor, I think it does. I
5 just want to make sure I understand a point of order
6 quickly. One of the purposes I raised the bill of
7 particulars was to sort of pin down what I would call
8 the predicate acts. And if I understood Mr.
9 Castellano and I understood the Court's ruling, that
10 you weren't going to limit them to what predicate
11 acts they chose to prove the enterprise. That's
12 okay. But I was a little concerned, why I stood up
13 is I thought I heard Mr. Castellano say that they
14 were going to use those predicate acts through the
15 co-conspirator exception. And I think the Court
16 addressed that by saying we're going to limit that to
17 what statements are provided through the agents as
18 part of the Molina and Marcantel charges.

19 THE COURT: The James hearing.

20 MR. LOWRY: Exactly, the James hearing.
21 But, if I understood things correctly, the Government
22 is reserving the right to reopen this after they
23 consider --

24 THE COURT: I mean, they always have that
25 right. They can always come back.

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1 MR. LOWRY: I didn't want to argue with
2 that. I wanted to make sure I understood the playing
3 field.

4 THE COURT: We'll see what they do. Maybe
5 we're getting our box and we can bring the box with a
6 lid on it.

7 You don't look happy, Mr. Adams.

8 MR. ADAMS: My head is spinning, Your
9 Honor.

10 THE COURT: Oh, you understand everything.

11 MR. ADAMS: I'm trying to -- I was trying
12 to figure out how to jump in here, because I'd really
13 not given thought to asking much related to the
14 Molina conspiracy. So I'll have to make some
15 adjustments.

16 BY MR. ADAMS:

17 Q. Mr. Acee, do you have the notes that you
18 had with you the other day that I believe were DeLeon
19 3298?

20 A. Yes.

21 Q. May I have those? And we'll just put them
22 on the Elmo.

23 A. I think I referred to this. This was a
24 timeline, I called it. And then this was the
25 transcript that I started today.

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1 Q. And these were documents that you went over
2 during your direct exam last week, or the week
3 before, with Mr. Castellano?

4 A. Yes, sir.

5 Q. I'm on page DeLeon 3298. Which of these
6 statements, here on 3298, were you thinking applied
7 to Mr. Garcia directly, or by, in your view, in
8 furtherance of his involvement in the conspiracy?

9 A. I don't believe any do on that first page.

10 Q. Turn to page 3299. We'll start at the top.
11 These pages contain highlights. Were those your
12 highlights and check marks added onto the document?

13 A. Yes, sir.

14 Q. Do any of these statements relate -- and I
15 don't know how to take the blue arrow off, or I
16 would. I'll just leave that alone, because I'm not
17 techie and I know that.

18 Do any of these at the top half of the page
19 relate to Mr. Garcia or his role in the alleged
20 conspiracy?

21 A. The conspiracy on Mr. Marcantel?

22 Q. Hard for me to know. That's what I thought
23 I would be asking you about, but I guess I should ask
24 you more globally about Mr. Garcia, as it relates to
25 any of these statements, in any way, in your mind, as

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1 the witness to offer all this stuff on behalf of the
2 Government, related to Mr. Garcia and SNM?

3 A. Not on the top of that page, I don't see
4 anything.

5 Q. All right. Let me go to the bottom of the
6 page.

7 A. I think that the first time it might come
8 up -- and I want to be cautious to make sure I'm
9 pointing out everything to you. It might be at
10 0730.010.

11 Q. Where it says, "CHS says to 'Pup' that
12 Robert" -- Robert Martinez, "wrote 'Pup' a wila
13 saying he was going to take care of Santistevan,
14 because he knows 'Pup; hates him. 'Pup' responds
15 with yes."

16 A. Yes, sir.

17 Q. And first of all, what is the 0730 signify?

18 A. That's the recording device.

19 Q. All right. And who had that recording
20 device?

21 A. Eric Duran.

22 Q. And do you know what date this was on?

23 A. So I have all the transcripts for 0730. I
24 can look through them. Off the top of my head, I
25 don't.

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1 Q. All right. Up above, at 730.007, it says,
2 "The CHS gives the date of October 23, 2016." Is
3 that in the ballpark?

4 A. Definitely in the ballpark.

5 Q. How does that have any direct impact on
6 Mr. Garcia?

7 A. I don't think it has any direct impact on
8 him. Yet it's one of the first indications that this
9 plot is being discussed or mentioned.

10 Q. And this is on a body wire?

11 A. Yes, sir.

12 Q. And was it a full recording of the body
13 wire, or were there unintelligible parts?

14 A. There is probably unintelligible parts. I
15 have the actual transcript here.

16 Q. All right. Will you please look at the
17 actual transcript?

18 A. Sure. I see one unintelligible. There
19 might be some other ones. It's not a very long
20 transcript. It's only two and a quarter pages.

21 Q. And for the purpose of our record, can you
22 tell us what page of the discovery the transcript is
23 on?

24 A. Yes, it starts at 6043, and it ends at
25 6046.

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1 Q. Of DeLeon?

2 A. Yes, sir.

3 Q. All right. Thank you. So do you have any
4 corroboration, or was this one-on-one alleged
5 conversation between Mr. Baca and Mr. Duran?

6 A. It's a one-on-one conversation.

7 Q. No one else was around?

8 A. Well, I wasn't there. I think it would be
9 pretty tough for other people to hear, given how they
10 have to communicate in the cells.

11 Q. No other context was provided for that
12 conversation?

13 A. Yes, sir. There is definitely more
14 context, because the transcript is quite a bit
15 lengthier than this one sentence summary. And this
16 is a summary written by an agent other than myself.

17 Q. Why would there be unintelligible parts of
18 the transcript?

19 A. Somebody could cough. There could be a
20 noise. The person transcribing it simply might not
21 understand the word. I've had that happen to me,
22 where you keep playing it, and you just can't
23 understand what the word being used is.

24 Q. You are the case agent, and -- yes?

25 A. I am.

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1 Q. And you're familiar with the different
2 people involved --

3 A. Yes, sir.

4 Q. -- in this case? You've reviewed the
5 audiotapes?

6 A. Yes.

7 Q. Did you review this audiotape and try to
8 help out with any unintelligible spots?

9 A. Yes, I've reviewed it. No, I didn't try to
10 help out with any unintelligible spots.

11 Q. Were you able to hear stuff that is not
12 included on the transcript?

13 A. In this particular one, I don't believe so.

14 Q. How did -- there is one more conversation
15 listed at the bottom of the page, 0730.011. Does
16 that, in your view, have any relation to Chris
17 Garcia's involvement -- alleged involvement with SNM?

18 A. Yes.

19 Q. How?

20 A. Well, you said -- does it show his
21 involvement in SNM, and it makes reference to proper
22 drug dealing. I would think Mr. Garcia would be a
23 good teacher of proper drug dealing.

24 Q. Fair enough. I'll ask it more narrowly and
25 then more broadly, if I can. Does it have any

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1 relation, specifically, to the allegations related to
2 the attempted harming of Mr. Marcantel?

3 A. No, sir.

4 Q. But you do believe it has references to
5 drug dealing and the gang, and that Mr. Garcia might
6 be relevant that way?

7 A. I do.

8 Q. All right. Let's go to the next page.
9 Well, let me back up. On the bottom of that
10 Mr. Garcia is in no way referenced directly in that
11 conversation, is he?

12 A. He is not.

13 Q. And the conversation as to 0730.011.

14 Just to be clear, Eric Duran was wearing
15 the body wire for most of these conversations?

16 A. Yes. I keep calling it the body wire, but
17 he had the wire.

18 Q. And he was not a member of SNM at that
19 time?

20 A. He was a member. He was a member.

21 Q. He was also a member of the FBI's
22 cooperating witness group, wasn't he?

23 A. He was.

24 Q. All right. And you can't conspire with a
25 federal agent or government agents?

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1 A. My understanding is we and our informants
2 cannot be part of the conspiracy.

3 Q. All right. So at this point he was working
4 for you; no doubt about that?

5 A. No doubt.

6 Q. And he was infiltrating -- or the plan was
7 for him to infiltrate suspected SNM activities, so
8 you could find out more information about them?

9 A. He was already in the middle. And we were
10 late to the game, so we joined it.

11 Q. Well, you sent him in next to Mr. Baca with
12 a recording device for the purpose of getting
13 evidence to use in court?

14 A. To be correct, we brought Mr. Baca in.
15 Mr. Duran was already there.

16 Q. All right. On the top of the next page,
17 3300, 730.011 continues. Is there anything else in
18 that reference, that part, that you believe has any
19 significance for Mr. Garcia?

20 A. No.

21 Q. Let me try to show you the rest of the
22 page. You have a lot of items checked off and
23 highlighted. So will you just please look at this
24 and tell me the next section that you believe has
25 implications for Mr. Garcia? Christopher Garcia, of

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1 course.

2 A. I think we need to move down, sir, to 019.

3 Q. Yes.

4 A. I would start at 019.

5 Q. All right. Is it the whole section of 019?

6 A. To play it safe, I'd say all of that
7 transcript, yes.

8 Q. All right. So we have "Pup" tells CHS to
9 have Mario "Poo Poo" hit Santistevan and/or Adam
10 Vigil, not Marcantel, and to have Chris Garcia
11 finance it. So let me stop there. So that mentions
12 Chris Garcia's name. Was Chris Garcia's name
13 mentioned on the actual transcript?

14 A. I believe it was.

15 Q. All right. Was there any -- did you have
16 any information at that time whether Chris Garcia was
17 in the loop on anything related to Marcantel at that
18 point?

19 A. I may have, because, as you may know, Duran
20 would provide me updates on the cellphone. So I, of
21 course, am not seeing this information until after we
22 recover the device and download it. So I think I may
23 have known that -- actually, I think I did know that
24 Chris Garcia's name was coming up before I heard the
25 actual recording.

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1 Q. That his name was coming up or that he had
2 been contacted and talked to?

3 A. Well, I know that he was contacted and
4 talked to because of, course, that happened on the
5 phone that we had the wiretap on.

6 Q. Related to procuring guns?

7 A. Yes, sir.

8 Q. As opposed to drugs?

9 A. He helped with both. But yes, firearms.

10 Q. You think that had happened by October 24,
11 2015?

12 A. I believe so, yes.

13 Q. All right. And so, as a result -- and then
14 it says on here that -- it says, "It needs to be done
15 because the administration is going to tear us to
16 shreds little by little."

17 Then the next bullet point is "'Pup" says
18 after the hits are done all the brothers will be
19 separated in various states, and that communication
20 with one another will be critical." And it says that
21 he and "Baby G" have a code that they use to write to
22 each other using two key numbers.

23 Do those statements have anything to do
24 with Garcia?

25 A. I suspect the middle one does, but not the

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1 one related to "Baby G" and the codes.

2 Q. That the brothers will be split up and
3 communication will be critical?

4 A. Yes.

5 Q. At the bottom of the page, 0730.020, there
6 is more stuff about Marcantel. Again, Garcia's name
7 is not referenced in that?

8 A. It's not referenced in this very short
9 summary, but I would want to double check the actual
10 transcript.

11 Q. All right. You think that this -- okay,
12 feel free to.

13 A. Sure. So, sir, just to be clear, you want
14 me to point out if Mr. Garcia's name is mentioned?

15 Q. Referenced in the 020 entry.

16 A. I don't see Mr. Garcia's name referenced.

17 Q. And in both the 019 and 020 entries, the
18 statements attributed to Mr. Baca is that he's
19 actually saying: Do not harm Marcantel. That's what
20 Eric Duran is reporting?

21 A. Yes. I'm only hesitating because this was
22 written by another agent, and that was his
23 interpretation of the recordings. This is before we
24 had stuff transcribed.

25 Mr. Adams, should I follow you with the

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1 actual transcript to make this quicker?

2 Q. Sure.

3 A. I'll track it.

4 Q. I turned to page 3301. And again, you have
5 highlighted and checked off materials related to
6 entries 0730.021 and 0730.022. Are those being
7 offered, in your view, against Mr. Garcia?

8 A. I think they are.

9 Q. Why?

10 A. It's discussed in the conspiracy.

11 Q. Right after the part about: Don't hurt
12 Marcantel; hurt other people so Marcantel can be
13 fired, which we just went over on the previous page.
14 So these are the next entries. And how does this
15 have relation or connection in your mind to
16 Mr. Garcia?

17 A. Well, this is the conspiracy. Mr. Baca is
18 laying out where he believes some of the would-be
19 victims live. And so I believe this is -- from an
20 investigative standpoint, I believe this is relevant
21 to the conspiracy.

22 Q. And is it your belief that Mr. Garcia had
23 joined the Marcantel conspiracy at this point in
24 time?

25 A. I don't think he had yet.

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1 Q. So those would be statements prior to his
2 being recruited or asked to join that conspiracy?

3 A. Perhaps. I need to line up the timeline a
4 little tighter, but I think you're correct.

5 Q. Again, is there any other corroborations
6 for these communications or the context of them other
7 than what's on the body wire and the transcript?

8 A. Well, there subsequently is.

9 Q. All right. Fair enough. How about as to
10 this particular conversation and the particular
11 recording. Were there any other guards around, any
12 other inmates or anything?

13 A. No, I'm just pausing because I'm thinking
14 of the letters. And I'm trying to remember what was
15 sent out in the letters. But no, there was no one
16 else that I believe witnessed this conversation.

17 Q. All right. I'll turn to DeLeon 3302. And,
18 again, there are many entries with check marks and
19 highlighted marks. Please let me know what you
20 believe applies to Mr. Garcia for purposes of the
21 James hearing.

22 A. I think we can go to the next page.

23 Q. All right. So nothing on 3302?

24 A. No, sir.

25 Q. See how easy that was? If we could just

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1 have nothing on all these pages, we could really move
2 through this. All right. Page 3303?

3 A. I'm looking at 1188.007.

4 Q. All right. And what is device 1188?

5 A. That's what we've been calling a body wire,
6 an ELSUR device.

7 Q. Who had that?

8 A. Mr. Duran.

9 Q. What was the other one?

10 A. The other one was 0370. This is evidence
11 of us switching the devices out, because I'm either
12 worried they're full or out of batteries.

13 Q. So it's a similar device, similar
14 technology; it's just a different version?

15 A. Yes.

16 Q. All right. So we have 1188.007. And this
17 is where there are actual conversations with Chris
18 Garcia?

19 A. Correct.

20 Q. And Mr. Garcia was telling Eric Duran that
21 he had was at home recuperating from surgery?

22 A. Well, they talk about the surgery. It's
23 kind of a funny conversation. I think it had been
24 some time ago, though.

25 Q. It might be funny to you, and it might not

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1 be funny to Mr. Garcia.

2 A. I apologize.

3 Q. There is a conversation about surgery on
4 his testicles as a result of being shot?

5 A. Correct.

6 Q. All right. And then tell me what part of
7 this entry that you're focusing on?

8 A. I highlighted it. It says "Pup" and CHS.
9 CHS: "Ask Garcia for Mario's phone number." That
10 would be Mario Montoya.

11 Q. And what else on the page?

12 A. Well, to speed it up, sir, everything that
13 I highlighted.

14 Q. Okay. You believe all this relates to
15 Chris Garcia and the Marcantel conspiracy?

16 A. I do.

17 Q. I'm showing you page 3304. This is the one
18 that has the handwritten notes.

19 THE COURT: Before we take on this
20 statement, why don't we take about a 15-minute break.
21 Let me let Ms. Bean rest her fingers. Then we'll
22 come back in and go for another half hour.

23 All right. We'll be in recess for about 15
24 minutes.

25 (The Court stood in recess.)

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1 THE COURT: Everybody grab a seat. Looks
2 like all the defendants have an attorney. Look
3 around, make sure that everybody is covered.

4 All right. Mr. Roberts, you're leaving at
5 about 5:15.

6 MR. ROBERTS: Yes, Judge.

7 THE COURT: All right. Be safe on your
8 trip.

9 MR. ROBERTS: Thank you, Judge.

10 THE COURT: All right. Mr. Acee, I'll
11 remind you you're still under oath.

12 Mr. Adams, if you wish to continue your
13 cross-examination of Mr. Acee, you may do so at this
14 time.

15 MR. ADAMS: Thank you, Your Honor.

16 THE COURT: Mr. Adams.

17 BY MR. ADAMS:

18 Q. Mr. Acee, on what day did Chris Garcia, in
19 your view, join the conspiracy to kill Gregg
20 Marcantel?

21 A. The day he agreed to -- he said he had
22 firearms, and agreed to pass them on to whomever
23 needed them.

24 Q. In November of 2015?

25 A. October or November.

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1 Q. All right. So you don't have an actual
2 date?

3 A. Not off the top of my head, no.

4 Q. Can you find a date? Is there something I
5 can give you to help you find a date?

6 A. If you have the wire intercept transcripts.
7 What I have are the body wire ones here.

8 Q. All right. Which one do you think
9 establishes the date that Chris Garcia allegedly
10 joined the Marcantel conspiracy?

11 A. I think that the telephone recordings would
12 be the ones I would want to refer to.

13 Q. Okay. Which phone call in particular?

14 A. Well, I'm going to say the one in which he
15 agrees to provide the firearms.

16 Q. All right. So that was the one -- and in
17 your mind, that's the time Chris Garcia entered the
18 conspiracy related to Gregg Marcantel?

19 A. In my mind, yes.

20 Q. All right. Chris Garcia was arrested on
21 December 3, 2015, we mentioned earlier; correct?

22 A. Yes, sir.

23 Q. What time of day?

24 A. Early morning.

25 Q. 6:00 a.m.?

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1 A. No, I had nighttime service warrants, so it
2 was before 6:00 a.m.

3 Q. There are statements that you referenced in
4 your direct on December 3, 2015. And they were on
5 DeLeon 3306. And item 1168.007, the date listed
6 there is December 3, 2015. Do you believe that to be
7 accurate?

8 A. No.

9 Q. What date do you think that is?

10 A. I think it's early December; I think it's
11 the 1st or 2nd.

12 Q. It's typed out twice. It says December 3,
13 2015. And the CHS gives the day of the 12/3/2015?

14 A. Correct.

15 Q. So you think that's inaccurate?

16 A. I do.

17 Q. All right. And 1168.080, which are
18 highlighted items that you went over with the AUSA in
19 your direct, they're references to "Mario should have
20 done the hit over the night." Wouldn't that be
21 consistent with it being on December 3, 2015, or
22 later?

23 A. Not necessarily, no.

24 Q. All right. Well, what date do you believe
25 this is?

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1 A. I think it's December 1st or 2nd.

2 Q. So you think it was prior to the arrest of
3 Mr. Garcia?

4 A. Yes, I think it was just prior, within a
5 day or two.

6 Q. All right. In your direct examination, you
7 referenced statements from Roy Martinez and Robert
8 Martinez related to killing Gregg Marcantel, didn't
9 you?

10 A. Yes, sir.

11 Q. And let me put DeLeon 3371, which were part
12 of your notes. At the bottom there is a reference to
13 March 23, 2015, you had a meeting with the STIU
14 administrator related to that information; correct?

15 A. No, sir. This was actually -- yes and no.
16 We were up there on a separate case, and then the
17 STIU sort of interrupted that meeting to point out
18 that they discovered this information.

19 Q. And was that the first you'd heard about
20 any talk about killing Gregg Marcantel?

21 A. Yes, sir.

22 Q. What was the source of that information?

23 A. If I remember correctly, Captain Sapien
24 said that he either obtained letters from one of his
25 informants, who I believe was Eric Duran, or

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1 Mr. Duran caused Captain Sapien to become aware of
2 it. But that was the gist of it. The SNM was
3 sending out leaders to hit Marcantel and Santistevan.

4 Q. So either Gregg Marcantel sent a letter to
5 the STIU administrator, or somehow got word to him
6 that he had heard this information?

7 A. I think you might have misstated. You said
8 Marcantel got the word?

9 Q. No, I'm sorry. That Eric Duran got the
10 word that there was a conspiracy forming against Mr.
11 Marcantel.

12 A. Yes, sir.

13 Q. All right. You referenced in here to a
14 credible and reliable CHS. And that would be Eric
15 Duran?

16 A. Yes. And let me clarify, this isn't my
17 report, but I used it for the timeline. I thought it
18 was a good timeline. But this is -- the STIU is
19 claiming that it's a credible and reliable informant.
20 I didn't know Eric Duran at this time.

21 Q. Okay. So you had never met the man. He
22 wasn't one of your guys at that point?

23 A. Correct. And it would be, I think, a
24 couple of months before I'd meet him.

25 Q. And so you, or whoever wrote this report,

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1 relied on their vouching for him being credible and
2 reliable?

3 A. Yes, sir.

4 Q. Where was this conversation allegedly held?

5 A. The one with me?

6 Q. No, about the Martinezes discussing taking
7 action against Mr. Marcantel.

8 A. I don't know.

9 Q. Was it in a cell pod?

10 A. Well, it would have to be.

11 Q. It could be in a rec yard?

12 A. Perhaps.

13 Q. Were there any other witnesses other than
14 the credible and reliable CHS, Eric Duran?

15 A. Not at that time, no. Cooperators come
16 forward later, but at that time, no.

17 MR. ADAMS: Judge, I beg your indulgence.

18 THE COURT: Certainly.

19 MR. ADAMS: Thank you. May I pass the
20 witness to my colleague, Mr. Lowry?

21 THE COURT: All right. Thank you, Mr.
22 Adams.

23 Mr. Lowry, cross-examination of Mr. Acee?

24 MR. LOWRY: Thank you, Your Honor.

25 THE COURT: Mr. Lowry.

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1 EXAMINATION

2 BY MR. LOWRY:

3 Q. Good afternoon, Special Agent Acee.

4 A. Good afternoon.

5 MR. LOWRY: May I approach, Your Honor?

6 THE COURT: You may.

7 Q. Let me start off, Agent Acee, you just
8 testified -- I think it was on the last document we
9 were looking at were the last calls, that you didn't
10 believe those calls were placed on December 3, 2015.11 A. Those recordings, I don't think that's an
12 accurate date.13 Q. Okay. And why don't you think that's an
14 accurate date?

15 A. I think Mr. Duran got the wrong date.

16 Q. And if I understood your testimony earlier,
17 that particular document was created before the
18 transcripts of those conversation were made?19 A. Yes. And I should clear something up, if
20 you'll permit me, about the date.

21 Q. Absolutely.

22 A. Okay. So Mr. Adams asked me what time we
23 started serving search warrants. And we started very
24 early, perhaps as early as 4:00 in the morning. And
25 that would apply to Mr. Garcia.

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1 But we, the FBI, didn't serve any search
2 warrants at the Department of Corrections. It was
3 STIU and their cert team that rounded up the
4 gentlemen that were up there. So I think that date
5 may be off. But it is possible that recording was
6 made, because that device wasn't recovered until
7 December 3. So it is possible. I've sat here and
8 said I think the date is wrong, but I'm actually
9 backpedaling. And it could be possible.

10 Q. And that's fair.

11 My next question would be: Did you ever
12 have the opportunity to review the HAWK data
13 regarding the conversations before drafting that
14 report?

15 A. No.

16 Q. So you didn't have --

17 A. And I didn't draft the report, sir.

18 Q. Fair enough. So whoever drafted the
19 report, do you think they had access to that kind of
20 information, the downloads from the ELSUR devices?

21 A. No.

22 Q. So we're not quite sure what the date would
23 be for that recording, if I'm understanding you
24 correctly?

25 A. Yes, sir.

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1 Q. Now, I want to back up for a second and
2 talk about the Marcantel conspiracy. And I believe
3 in your testimony last week you had talked about --
4 if I understood you correctly, there were statements
5 made by Roy Martinez and Rob Martinez?

6 A. Yes.

7 Q. To the best of your knowledge, that is the
8 first anyone in the Department of Corrections or the
9 FBI learned about that conspiracy?

10 A. Yes.

11 Q. And I believe you testified that there was
12 a letter sent by one of those two to Mr. Baca after
13 he was shipped out of the state?

14 A. I don't recall that.

15 Q. If there was communication like that, would
16 that be the type of corroborative information you
17 would need to know, whether Mr. Baca understood the
18 conspiracy or not?

19 A. That would be helpful, yes.

20 Q. Was STIU actively monitoring the mail of
21 Roy Martinez at that time?

22 A. I believe so.

23 And Mr. Lowry, I'll be honest, I didn't
24 know who Roy Martinez was. I didn't know much about
25 the SNM before that date.

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1 Q. Before March of 2015?

2 A. Correct.

3 Q. But it's fair to say that you worked
4 closely with STIU since March of 2015?

5 A. Absolutely.

6 Q. And you developed a pretty substantial
7 working knowledge about their basis of knowledge
8 about the Marcantel conspiracy?

9 A. Yes.

10 Q. And so I'm asking you, from your training
11 and experience and your investigation in this case if
12 you are aware that Roy Martinez' mail was being
13 scrubbed or censored as it left the facility?

14 A. I hope it was. But sometimes I'm
15 disappointed. And I make mistakes as well.

16 Q. And I'll ask you the same question with
17 regard to Rob Martinez or "Baby Rob"?

18 A. My answer would be the same. I hope it
19 was.

20 Q. Do you have any sense from your
21 investigation in this case whether Mr. Baca's mail
22 was being screened as it entered either the Arizona
23 facility?

24 A. I believe it was.

25 Q. And it would also have been screened when

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1 he was at ADX in Florence, Colorado?

2 A. It definitely was up there.

3 Q. And you don't have any letters -- there is
4 no correspondence from either one of those facilities
5 referencing the Marcantel --

6 A. That is correct.

7 Q. Now, if I understand the case correctly,
8 Mr. Baca was transferred out of the Department of
9 Corrections within the days following -- I think it's
10 March 12, if I'm correct?

11 A. That's my understanding as well.

12 Q. Did Mr. Roy Martinez have an opportunity to
13 talk to Mr. Baca between the Molina murder and his
14 transport out?

15 A. I don't believe so.

16 Q. The same question for "Baby Rob"?

17 A. I don't believe so.

18 Q. So, to the best of your knowledge, as the
19 case agent investigating that conspiracy, was there
20 any direct communication between either Roy Martinez
21 or "Baby Rob" Martinez with Mr. Baca?

22 A. Not after the murder, no.

23 Q. And it's your understanding that this
24 scheme, the conspiracy, plot originated post-Molina
25 murder?

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1 A. No.

2 Q. When do you think it originated?

3 A. I later learned, through talking with
4 cooperators, that the idea went back as early as
5 2013. My investigation on what we always refer to as
6 the hits or the conspiracy started in March of 2015.
7 But in talking with guys, I learned that it had been
8 talked about before.

9 Q. What guys?

10 A. A few -- well, I'd have to get back to you.
11 I'd have to spend some time looking at 302s. But I'd
12 feel comfortable saying two to three SNM members who,
13 of course, would be cooperators now, told me they had
14 conversations with Mr. Baca relating to hitting -- I
15 think they all pertain to Santistevan.

16 Q. And those would have predated the Molina
17 March 7, 2014?

18 A. Yes, sir. Because the dates that I'm
19 thinking of in my reports is, the best that those
20 informants could come up with, was 2012, 2013.

21 Q. Do you have reason to believe that those
22 informants' statements were credible?

23 A. Well, I never fully believe informant
24 statements, I mean -- but I write down what they tell
25 me.

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1 Q. And I guess that's my point, is you don't
2 have -- did you do any independent corroboration of
3 those statements?

4 A. Tough to do. But I try where we can, yeah.

5 Q. We'll come back to that next week or the
6 next James meeting, if you will.

7 I want to jump up a bit. Just this
8 afternoon you were talking about the statements, the
9 Perez/Cordova recordings. And if I read the language
10 you were highlighting correctly, you believe that Mr.
11 Perez had made statements about Mr. Baca's desire
12 to -- regarding Mr. Baca in which conspiracy? The
13 Molina conspiracy?

14 A. Molina. Yes, I don't -- I've read Mr.
15 Perez' transcripts a lot in the last couple of days.
16 I don't think there is any mention of Marcantel. So
17 it mostly pertained to the Molina.

18 Q. And any opportunity Mr. Baca had to speak
19 with Mr. Perez would have been after the Molina
20 homicide?

21 A. Well, I don't -- about the homicide?

22 Q. Correct. That's what --

23 A. Based on what I have reviewed, I think
24 that's correct.

25 Q. So all of the statements referenced in

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1 the -- what I'll call the Perez/Cordova recorded
2 conversations, those statements took place after that
3 event had transpired?

4 A. I believe so.

5 Q. So those statements couldn't have been made
6 in an effort to have Mr. Molina killed, could they
7 have?

8 A. No, if they're made after. No.

9 MR. LOWRY: May I approach, Your Honor? I
10 just want to get the marked statements.

11 THE COURT: You may.

12 MR. LOWRY: Your Honor, I have a request.
13 It's 5:25. I don't want to waste the five minutes,
14 but I think I could save the five minutes if we
15 adjourned early, and I resumed the next time we had
16 the James hearing with Mr. Acee, rather than fumbling
17 through the exhibits.

18 THE COURT: Go ahead. We'll wait on you.

19 Don't worry about it. Take your time.

20 While you're looking through those, I want
21 to come back to a point with Mr. Adams. Let me
22 explore a little bit with you, while Mr. Lowry is
23 looking at these documents, it seems to me -- you
24 were talking about your head swimming and trying to
25 get a grasp -- this is what I think is going on --

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1 tell me if I'm wrong -- what I'm doing with this
2 James hearing is trying to determine whether certain
3 statements are going to come in for two conspiracies
4 in the first trial, Molina and the Secretary. But
5 that both conspiracies are going to be used against
6 all five defendants to establish enterprise,
7 racketeering, furtherance of the enterprise, and
8 things like that. Do you see it differently?

9 MR. ADAMS: Judge, we have been working on
10 some jury instructions. And I have not been one of
11 the point people on that. So I would like to consult
12 our work product on that. But I think that does make
13 sense. But, obviously, the focus has to be on the
14 indicted VICAR offenses. And for us, that is not the
15 Molina incident. For us, that is the Marcantel
16 allegations. So I do think there can -- by their
17 charging decision, it's messier than a traditional
18 trial. But --

19 THE COURT: But isn't the reality we're
20 going to be in this room on the 29th, and the
21 Government is going to be putting on two
22 conspiracies. And both are harmful to you, right?
23 Because, even if you're not involved in one, you're
24 going to be sitting there, and they're going to be
25 saying, Yeah, but it's the same enterprise, it's the

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1 same furtherance of that enterprise, and these are
2 the crimes that were committed in furtherance of it?

3 Isn't that the reality? I mean, you may not --

4 MR. ADAMS: I think that is. I think that
5 was why there have been motions to sever. Even
6 within the January 29 group, people wanted to sever
7 because of the overlap or prejudice, or however you
8 want to refer to it.

9 THE COURT: But even if they were severed,
10 you were just sitting there with Mr. Garcia, they can
11 come in with any group of crimes they want to,
12 though, to try to prove their enterprise? I mean,
13 that's the reality. That's the reason the
14 severance -- I'm working on Mr. Sanchez, so I've been
15 up here looking at his anyway. But the reality is,
16 they could pick their crimes to show it, so --

17 MR. ADAMS: But Judge, there are not overt
18 acts in this indictment. So I would think 403 --
19 this is off the top of my head -- I believe 403 would
20 have to be used by the Court to regulate what kind of
21 evidence could be admissible. If we were solely in
22 the Gregg Marcantel counts, and nothing else were
23 merged, if they wanted to put up, you know, a 2008
24 homicide that five other alleged SNM members
25 committed, you know, we would have a hard time with

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1 that, and we would ask you not to let them do it.

2 And I suspect you would be troubled by their wanting
3 to just scare the jurors. And so there has to be
4 some limit.

5 1613, it may be different. They have overt
6 acts; they've alleged hundreds of them. But in this
7 case there aren't overt acts, so I would think the
8 403 balancing has to kick in and guide what can be
9 used against different people, and where curative
10 instructions and limiting instructions come into
11 play.

12 THE COURT: Well, I'll certainly listen,
13 but I think I've signaled early on that I'm not
14 seeing those limitations. It seems to me that the
15 Government, pretty much, they get to choose how they
16 want to prove the enterprise. And you might think
17 one crime is worse than another crime, but, you know,
18 from a 403 standpoint, I think it's very difficult to
19 go in and start telling the Government, Well, that
20 crime is not too prejudicial, but this crime is okay.
I probably am not going to go that direction.

22 We don't have to argue it today, but put it
23 in the back of your mind.

24 MR. ADAMS: I will look at the jury
25 instructions in the very near future, because I look

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1 forward to continuing the discussion.

2 THE COURT: I'm not seeing this as really
3 more jury instructions. I'm seeing this as more
4 evidentiary rulings I've got to make. And I'm
5 sitting here going: It looks like this stuff is
6 coming in.

7 So, anyway, we don't have to discuss it,
8 but that's -- when you said your head was swimming,
9 it seems to me that it shouldn't be swimming because
10 it's coming in. You may not have an interest in that
11 conspiracy, and sitting there and being the lawyer
12 that gets up and tries to defend against it; you may
13 want to rely on your co-counsel for that, or other
14 defendants' counsel. But it seems to me, you know,
15 from a legal, theoretical standpoint, you have an
16 interest.

17 That's the reason I've been having a fairly
18 wide open James. Anybody got any -- because I'm
19 seeing that the Government is planning to use this
20 evidence potentially against everyone in the room.

21 MR. ADAMS: Well, that's the purpose of the
22 RICO statute. There is an overarching conspiracy,
23 Your Honor. And under that, there are smaller
24 conspiracies under the same roof according to the
25 theory of the Government.

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1 THE COURT: Well, I don't mind being
2 educated on this, but -- you can tell I'm trying to
3 be honest with you what's in my head. And if I'm
4 wrong, if I don't understand how the evidence is
5 going to come in, you probably need to start
6 educating me earlier rather than later. Because I've
7 signaled several times in this case that I'm not
8 seeing how to keep this evidence out. It seems to me
9 that, once they made this a racketeering case and a
10 VICAR case, and when they are trying it that way, the
11 evidentiary standards are quite broad.

12 Anyway --

13 MR. LOWRY: Your Honor, if I may on that
14 point.

15 THE COURT: Okay.

16 MR. LOWRY: Well, this -- I don't want to
17 belabor the issue, but this was one of the reasons I
18 brought up the bill of particulars motion earlier in
19 the year, is because, frankly, the palette of
20 possibilities for the Government is fairly large
21 here. And I'm concerned about the nature of, you
22 know, surprise. I mean -- or just what the
23 Government plans on to base the predicate acts. And
24 I think that's why one's head may swim at a certain
25 point in time.

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1 And I just didn't know if we can get any
2 additional -- I understand the Court's position. I
3 don't think it's a matter of saying one is more
4 prejudicial than the other. But it would be nice to
5 know what the constellation of those prejudicial acts
6 could be, so the defense could properly prepare.

7 THE COURT: Well, we've crossed that
8 bridge. If you want an opinion on it, that might be
9 something that you want me to turn to sooner rather
10 than later, is trying to put out an opinion on it.

11 But do you want to say something else, Mr.
12 Adams? I'll let you have the last word.

13 MR. ADAMS: I do. But I'm going to stew on
14 it a little bit longer and bring it up another time.

15 But I think, Judge, I will say that we did
16 get -- and we filed a response this morning, or last
17 night -- we got the 404(b) notices. And they were
18 every single Overt Act from 1613 alleged against
19 Mr. Garcia. So I guess in the Government's view, it
20 would be similar to what you're saying, that there
21 are no parameters on what might be relevant evidence
22 in this trial. And so I'm wondering how -- if we --
23 we're not really going to have any notice on what
24 we're facing.

25 THE COURT: Well --

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1 MR. ADAMS: If 255 overt acts for a July
2 trial are somehow now all potentially relevant for a
3 January 29 trial, A, I don't know that we know what
4 we're facing; and B, I don't know how we're going to
5 finish our rodeo in six weeks, as scheduled.

6 THE COURT: Well, I would assume that, at
7 some point, the Government is going to decide what it
8 is going to throw at you. I mean -- and so they'll
9 probably say: We're not going to throw 210, we're
10 going to throw 30, 15. But that's kind of their
11 choice.

12 MR. ADAMS: It would be wonderful to be
13 able to litigate the real stuff and not the fake
14 stuff. I think it would be helpful for all of us to
15 know what we're really facing January 29th, not the
16 hypothetical Titanic situation.

17 THE COURT: You can think over the weekend,
18 and tell me what -- other than raw judicial power --
19 I have to force them to tell you that. We're back to
20 where we're plowing old ground.

21 Let's call it a night. See y'all at 1:00
22 on Monday. Everybody be safe.

23 If you do decide you want me to be writing
24 or working on something in particular, so this is
25 informed discussion, you tell me. All right.

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1 MS. SIRIGNANO: Judge?

2 THE COURT: Everybody be safe. Have a good
3 weekend.

4 (The Court was adjourned.)

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7 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
8 Official Court Reporter for the State of New Mexico,
9 do hereby certify that the foregoing pages constitute
10 a true transcript of proceedings had before the said
11 Court, held in the District of New Mexico, in the
12 matter therein stated.

13 In testimony whereof, I have hereunto set my
14 hand on December 15, 2017.
15
16

17 
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